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Karen Hammack

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THE CLEAN AIR ACT: "TAKING A STICK TO THE STATES"

THE CLEAN AIR ACT AMENDMENTS OF 1970¹ were designed to alleviate the ineffectiveness of earlier legislation which delegated responsibility for the control of air pollution almost exclusively to the states. Until 1970 the initiative for the setting and implementation of clean air standards rested entirely with the states.² By late 1970 only ten states had set standards and none had plans to implement those standards.³ Partly because of the states' unresponsive attitude, it was felt that a "drastic revision"⁴ in the approach to air pollution control would be necessary to overcome some of the problems with the earlier legislation. Congress also recognized that uniformity among state standards for air quality was desirable for several reasons. Perhaps the primary reason was the acknowledgment by Congress that the protection of the public health was its responsibility.⁵ It was also anticipated that nationwide standards would eliminate the duplication of research caused when each state developed its own standards. Finally, Congress hoped to relieve some of the pressure being exerted by industry upon the states to set low air quality standards.⁶ By locating the responsibility for determining the standard of air quality at the federal level, Congress intended to speed up the process of pollution control.

In the words of Justice Rehnquist, "Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970. . . ."⁷ The result was a comprehensive piece of legislation aimed at achieving a nationally set level of air quality within a prescribed period of time, while leaving the primary responsibility for implementation of

¹ Clean Air Act, 42 U.S.C. §§ 1857-1858a (1970). In the following notes, unless otherwise specified, Clean Air Act refers to Clean Air Act, 42 U.S.C. §§ 1857-1858a, as amended through 1970.

² See, e.g., Pub. L. No. 90-148, 81 Stat. 485 (1967) (current version at 42 U.S.C. §§ 1857-1858a (1970)). This was the immediate predecessor to the Clean Air Act Amendments of 1970. For a discussion of pre-1970 legislation, see Note, *Clean Air Act Amendments of 1970: A Congressional Cosmetic*, 61 GEO. L.J. 153, 154-59 (1972).

³ 116 CONG. REC. 32,916 (1970).

⁴ The Fourth Circuit used the words "a drastic revision" to describe the overhaul undertaken by Congress in the formulation of the Clean Air Act of 1970. *Appalachian Power Co. v. EPA*, 477 F.2d 495, 497 (4th Cir. 1973).

⁵ S. REP. NO. 1196, 91st Cong., 2d Sess. 2 (1970):

Although the nature of the attack will differ from region to region, one objective will be the same: Air quality standards protective of the health of persons must be achieved within the 3-year period of the approval of plans to implement ambient air quality standards. The right of States to set more stringent standards of air quality has been preserved.

⁶ "Finally, by removing standard-setting authority from the states, Congress was reacting to indications that large industries were able to pressure states into setting low air standards." Note, *Clean Air Act Amendments of 1970: A Congressional Cosmetic*, 61 GEO. L.J. 153, 157 (1972).

⁷ *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 64 (1975). This was the Supreme Court's first interpretation of the Clean Air Act of 1970. For a further discussion of the case see note 10 *infra*.

this national standard with the states.⁸ In the years since its passage, the Clean Air Act has had its goals seriously challenged by the energy crisis,⁹ and the Supreme Court has had several opportunities to interpret the Act.¹⁰ In addition, congressional committees have recently submitted wide ranging proposals to amend the Act.¹¹ It seems appropriate at this stage in the Act's history to consider the degree of success attained by this novel piece of legislation.

In order to evaluate the effectiveness of the Clean Air Act of 1970, this Note will first examine how one heavily industrialized state has responded to "having a stick taken to it." Additionally, the federal-state relations which have resulted from the shift in emphasis from state to federal control, and industry's onslaught on the courts for judicial review of actions taken by both federal and state agencies will be exam-

⁸ Section 101(a)(3), 42 U.S.C. § 1857(a)(3) (1970) provides that: "[T]he prevention and control of air pollution at its source is the primary responsibility of States and local governments."

⁹ In response to the oil embargo and resulting energy crisis of 1973, 42 U.S.C. § 1857c-10, entitled "Authority to deal with energy shortage," was added to the Clean Air Act. This section authorized a temporary suspension of regulations for a period of approximately one year upon a finding that a polluter would be unable to comply with the national air quality standards because of the unavailability of necessary fuels. 42 U.S.C. § 1857c-10 (Supp. IV 1974) (amending 42 U.S.C. § 1857c (1970)). An addition was also made to the section governing state implementation plans. This addition required the Administrator of the EPA to review each state plan to determine whether any revision could be made to accommodate fuel burning polluters "without interfering with the attainment and maintenance of any national ambient air quality standard. . . ." 42 U.S.C. § 1857c-5(a)(3)(B) (Supp. IV 1974) (amending 42 U.S.C. § 1857c-5 (1970)).

¹⁰ A discussion of *Fri v. Sierra Club*, 412 U.S. 541 (1973), appears at notes 236-41 *infra* and accompanying text. The decision of *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), reconciled a split among the circuits with regard to a state's authority to grant a "variance" for an individual polluter from the state's general compliance schedule. The Act states that the EPA must approve any revision of a state implementation plan as long as national standards and deadlines are not threatened by such approval. Section 110(a)(3)(A), 42 U.S.C. § 1857c-5(a)(3)(A) (1970). Respondents were successful in the Fifth Circuit in contending that the state must proceed under a very rigid provision of the Act, which provides for a one-year postponement, rather than under the revision section. On appeal to the Supreme Court, the Fifth Circuit decision was reversed, based upon the Court's finding that the postponement provision did not constitute the sole mechanism for exceptions to a state plan once the plan had been approved. In so doing, the Court accepted the Environmental Protection Agency's interpretation of the pertinent provision. In approving variances in the future, the Agency is required to determine that the air in the relevant area meets the national standard and that the proposed variance will not endanger continued maintenance of the air quality at that nationally set level. Mr. Justice Rehnquist wrote the opinion for the majority of seven. Mr. Justice Douglas dissented without opinion and Mr. Justice Powell took no part in the decision. For discussions of this case, see Hardy, *Train v. Natural Resources Defense Council: The Genesis of a New Era of Federal-State Relationships in Air Pollution Control*, 24 CLEV. ST. L. REV. 397 (1975); Hoffman & Swartz, *Environmental Law*, 1974-75 ANNUAL SURVEY OF AM. LAW 641 (1975).

The most recent decision in this area, *Union Elec. Co. v. EPA*, 96 S. Ct. 2518 (1976), will be more extensively treated. See notes 179-87 *infra* and accompanying text. During the 1976-77 term some interesting questions relating to federal-state relations will be considered. See notes 103-30 *infra* and accompanying text.

¹¹ The House and Senate are currently considering amendments to the Clean Air Act. The Senate Public Works Committee, Subcommittee on Environmental Pollution and the House Interstate and Foreign Commerce Committee submitted proposals to their respective bodies for consideration. A Conference version will be considered by the 95th Congress. See discussion *infra* at notes 227-80 and accompanying text.

ined. In particular, the central role which the sulfur dioxide standards have played will serve to illustrate some of the areas in which the Clean Air Act has encountered difficulties. Sulfur dioxide is the primary pollutant emitted by the burning of coal, and the nation's increased dependence on coal has created a serious test of Congress' technology-forcing policy embodied in the 1970 Amendments.¹² This is so because the control of this particular pollutant has demanded technological innovation and costly improvements to new and existing plants. As a result, industry and particularly the electric utilities, have made a concerted effort to delay implementation and undermine the deadlines established by Congress. The latter portion of this Note will consider their success rate in view of the proposed amendments to the Clean Air Act to be voted upon by the 95th Congress.

I. OVERVIEW OF THE LEGISLATION

This Note will be concerned with stationary source compliance under the Clean Air Act.¹³ The Act required the Administrator of the Environmental Protection Agency (EPA) to compile a list of pollutants "which in his judgment [have] an adverse effect on public health and welfare."¹⁴ Two of the six pollutants originally listed by the Administrator, sulfur dioxide and particulate matter, are primarily emitted by stationary sources whereas the other four pollutants are emitted by mobile sources. The Clean Air Act requires two National Ambient Air Quality Standards (NAAQS)¹⁵ to be set for each pollutant. The first standard is aimed at the protection of the *public health*. Since Congress determined that this standard was of primary importance, a specific deadline was set for its attainment. The more stringent secondary standard was not believed to be of such immediate necessity. The secondary standard provides for a level of air quality which will protect the *public welfare* by further reducing levels of pollution in order to eliminate damaging effects on soil, vegetation, physical structures, and visibility.¹⁶

¹² See notes 142-50 *infra* and accompanying text.

¹³ Title I of the Act is designed to control air pollution which is emitted from stationary sources. Stationary sources are defined to include "any building, structure, facility or installation which emits or may emit any air pollutant." 42 U.S.C. § 1857c-6 (1970). In other words, Title I is intended to control primarily industrial polluters. Title II controls emissions from mobile sources such as motor vehicles.

¹⁴ Section 108(a)(1)(A), 42 U.S.C. § 1857c-3(a)(1)(A) (1970). To date six pollutants are regulated and others are being studied. The six pollutants presently controlled are: sulfur dioxide, carbon monoxide, nitrogen oxides, photochemical oxidants, particulates, and hydrocarbons. The Second Circuit recently affirmed a New York district court's decision instructing the agency to add lead to its list. *Natural Resources Defense Council, Inc. v. Train*, 545 F.2d 320 (2d Cir. 1976). The Sierra Club has filed suit to require that sulfates be added to the list. See note 28 *infra*.

¹⁵ Section 109, 42 U.S.C. § 1857c-4 (1970). The Supreme Court has defined the ambient air as "the outdoor air used by the general public." *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 65 (1975).

¹⁶ Section 109(b)(2), 42 U.S.C. § 1857c-4(b)(2) (1970). The Act defines effects on the public welfare as including: "[E]ffects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well being." Section 302, 42 U.S.C. § 1857h (1970).

The secondary standard was to be attained within a reasonable time after attainment of the primary standard.

Stringent timetables are set up throughout the Act. For example, the Administrator had thirty days after the enactment of the statute to publish a list of pollutants¹⁷ and four months to publish the primary and secondary NAAQS.¹⁸ Within nine months after the federal standards were promulgated, each state was required to submit a State Implementation Plan (SIP) to the agency.¹⁹ The Administrator then had four months to approve or disapprove each state plan according to eight criteria set forth in the Act.²⁰ If the plan met each of these criteria, the Administrator was required to approve it.²¹ If a state's plan was found to be in some respect deficient, the Administrator had two more months in which to promulgate regulations for that state.²² The most important of these eight criteria directed that the plan provide for: "the attainment of such primary standard as expeditiously as practicable *but . . . in no case later than three years from the date of approval of such plan. . . .*"²³ Pursuant to these timetables, the plans were to be approved by mid-1972 and the primary standard was to be implemented by mid-1975.

In formulating their SIPs, the states were given full responsibility for determining the "mix of emission limitations"²⁴ necessary to attain the national standards. Congress felt that decisions concerning the

¹⁷ Section 108(a)(1), 42 U.S.C. § 1857c-3(a)(1) (1970).

¹⁸ Section 109(a)(1)(A), (B), 42 U.S.C. § 1857c-4(a)(1)(A), (B) (1970). The national standards were published in April, 1971 at 40 C.F.R. § 50.4 (1971).

¹⁹ Section 110(a)(1), 42 U.S.C. § 1857c-5(a)(1) (1970). The State Implementation Plans were due, therefore, on January 31, 1972.

²⁰ Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2) (1970). That section provides in part:

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator *shall* approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that —

(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard *as expeditiously as practicable but* (subject to subsection (e) of this section) *in no case later than three years from the date of approval of such plan . . .*; and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies *a reasonable time* at which such secondary standard will be attained.

(Emphasis added.) While these deadlines are at the core of the SIP, the statute specifies seven other criteria which the Administrator must consider. The plan must include: (1) emission limitations — timetables for compliance; (2) monitoring devices for analysis of air quality; (3) a procedure for reviewing the location of new sources; (4) adequate provisions for intergovernmental cooperation; (5) necessary assurances from the state that it will have adequate personnel, funding, and authority with which to implement the SIP; (6) procedures for periodic inspection of motor vehicles; and (7) provisions for revision of the SIP in certain circumstances.

²¹ Upon approval, the state plan becomes enforceable as both a federal and a state law. See note 75 *infra*.

²² Section 110(c), 42 U.S.C. § 1857c-5(c) (1970). Federal promulgation will be discussed *infra* at note 57.

²³ Section 110(a)(2)(A)(i), 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970) (emphasis added). Unfortunately, in a number of areas the primary standard has not yet been attained, and deadlines have been extended to 1977.

²⁴ *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975).

amount of emissions from each local source were best handled at the local level where all the industry-specific technological and economic ramifications could be considered. With first-hand knowledge of the special problems created, the states could, perhaps, shift more of the burden to those industries which could more efficiently reduce their emissions. Congress' only concern was that the standard necessary to protect the public health be met; how this was accomplished was of little importance to Congress, but of great economic significance to the states.

The tendency of the states in the past had been to weigh the public health and welfare against the revenues being produced by industry and to devise a cost-benefit analysis which reflected a lower monetary value for intangibles such as the public health and welfare. Without national standards, this weighing process was inevitable, particularly in industrial states, because of the fear that the huge expenditures of capital necessary for adequate pollution control might drive industry to a less restrictive state. The question arises whether the national standards set by the EPA pursuant to the Clean Air Act Amendments of 1970 have, by neutralizing any competitive advantage among the states, alleviated the hesitancy of industrial states to regulate industry. Unfortunately, the problem that existed with pre-1970 legislation has recurred in the context of enforcement; states, though charged with enforcement of the Act, are all too often sympathetic to those they are supposed to regulate. In theory, Congress maintained that "existing sources of pollutants either should meet the standard of the law or be closed down."²⁵ In practice, the states have been unwilling to take such drastic measures in enforcing their SIPs. The states are understandably hesitant to cut the economic lifelines that employ large numbers of their citizens and provide necessary services to the state.

The alternative of federal enforcement, however, if carried to extremes, would cripple air pollution control. It was not Congress' intent that enforcement rest with the federal EPA;²⁶ the federal agency simply does not have adequate resources to take over if a number of states default on their responsibilities. Yet, when a state either refuses to promulgate an implementation plan or refuses to enforce an existing plan, the only remedy provided by the Act is federal assumption of the responsibility.²⁷ An examination of the implementation and enforcement problems encountered in the northern industrial state of Ohio will demonstrate the conflicts which emerge when a state permits industry to dictate the extent of its own regulation.

²⁵ S. REP. NO. 1196, 91st Cong., 2d Sess. 3 (1970).

²⁶ See, e.g., section 101(a)(3), 42 U.S.C. § 1857(a)(3) (1970), quoted at note 8 *supra*. Another statutory indication that Congress intended for the states to assume full responsibility for enforcement is implicit in the requirement that the implementation plan contain "assurances that the State will have adequate personnel, funding and authority to carry out such implementation plan. . . ." Section 110(a)(2)(F), 42 U.S.C. § 1857c-5(a)(2)(F) (1970).

²⁷ It has been suggested that Congress lacked the legal authority to force the states to undertake enforcement. Comment, *State Implementation Plans and Air Quality Enforcement*, 4 *ECOLOGY L.Q.* 595, 631, 634 (1975). See discussion at notes 98-130 *infra* and accompanying text.

II. ONE STATE'S RESPONSE — FEDERAL INTERVENTION

The disruption of air pollution control in Ohio has revolved around the sulfur dioxide regulations. Sulfur dioxide, considered hazardous to the public's health and welfare, is one of the six pollutants currently regulated by the EPA. Increased incidences of bronchitis, diseases of the lower respiratory tract (particularly in young children), increased asthma attacks, and aggravation of symptoms in cardiopulmonary patients have all been attributed to high sulfur dioxide levels in the air.²⁸ Sulfur dioxide particles combined with atmospheric moisture produce a sulfuric acid mist or rain which damages crops and vegetation as well as buildings and other man-made materials. In addition, sulfur dioxide in the atmosphere produces a brownish haze which decreases visibility.

According to the Natural Resources Defense Council (NRDC): "Ohio emits more sulfur oxides than any other State — emissions that affect the health of people hundreds of miles beyond Ohio's borders as well as residents of this State. That alone is enough to make the Ohio Plan significant nationally."²⁹ As recently as August 27, 1976, Ohio had no plan for control of sulfur dioxide emissions³⁰ despite the fact that in January 1972 a significant number of Ohio citizens converged on the state capital to attend public hearings concerning Ohio's plan for clean air.³¹ In that short-lived era of heightened public support for a clean environment, Ohio submitted a plan even more stringent than that proposed by the federal agency.³² Rather than require the attainment of the primary standard within three years and the secondary standard within a reasonable time thereafter, Ohio set the deadlines

²⁸ U.S. EPA, *HEALTH CONSEQUENCES OF SULFUR OXIDES: A REPORT FROM CHES*, 1970-71 at 7-4 to 7-23 (1974). The study suggests that suspended sulfates may be more dangerous to the public health than either particulates or sulfur dioxide. Sulfates are not emitted directly, but are secondarily formed in the atmosphere from other sulfur compounds. Presently, there are no standards for sulfate regulation, but it is anticipated that greater restrictions on the sulfur content of fossil fuels will be required once sulfur pollutants have been adequately studied. One report has indicated that concentrations of sulfates at 10 micrograms per cubic meter may present a health hazard to certain population groups. *ENVIR. REP. (BNA)*, 7 *Current Dev.* 291-92 (June 18, 1976); compare this report with the sulfur dioxide standard of 80 micrograms, note 33 *infra*. The Sierra Club has recently filed suit to force the EPA to develop ambient air quality standards for sulfates. *Id.* at 62 (May 21, 1976). See also Strelow, *Reviewing the Clean Air Act*, 4 *Ecology L.Q.* 583, 587 (1975).

²⁹ Statement of Richard E. Ayres on behalf of Natural Resources Defense Council, Inc. on Proposed SO₂ [sulfur dioxide] Regulations for Ohio, January 13, 1976, at 1 (submitted in writing at hearings conducted by the Federal EPA in Columbus, Ohio) [hereinafter cited as Statement of Richard Ayres]. This fact was also asserted by the New York Times. *N.Y. Times*, Feb. 10, 1976, § 2 at 1, col. 1.

³⁰ In August 1976, the federal EPA published final regulations for control of sulfur dioxide emissions in Ohio. 41 Fed. Reg. 36,323 (Aug. 27, 1976). That plan is not yet operative. See notes 62-64 *infra* and accompanying text.

³¹ "In 1971, in conformity with the Clean Air Amendments of 1970, the State formulated a plan that would have markedly reduced air pollution from Ohio industry. Two thousand Ohio citizens turned out to public hearings to support this strong action to restore Ohio's air to healthful quality." Statement of Richard Ayres, *supra* note 29, at 2.

³² Although Congress established a nationwide standard, the states retained the right to set more stringent standards. See note 5 *supra*. For an in-depth discussion of section 116, 42 U.S.C. § 1857d-1 (1970), which reserves this right to the states, see notes 68-75 *infra* and accompanying text.

for the primary and secondary standards at the same time — three years from the date of federal approval.³³ Ohio's plan was submitted on schedule to the Administrator of the EPA and, with a few exceptions, was approved by the Administrator four months later, in accordance with the schedule established by Congress.³⁴

Ohio industry, in particular the electric utilities,³⁵ immediately began what has become a prolonged fight to weaken those standards. Their gains have been substantial. First, the deadline for attainment of the primary standard for five of the six pollutants has been extended from mid-1975 to mid-1977.³⁶ Secondly, with regard to the sixth, sulfur dioxide, the standard has been reduced to the less stringent federal primary standard with the deadline extended to 1979.³⁷ Implementation of the secondary standards has likewise been deferred.

How did the electric utilities accomplish this? The onslaught began with a section 307 challenge³⁸ to the Administrator's approval of Ohio's plan in 1972. The Clean Air Act provides that any interested party can challenge the Administrator's actions under the judicial review provision of the Act, section 307.

In *Buckeye Power, Inc. v. EPA*,³⁹ the petitioners, electric utilities from Ohio and Kentucky, challenged the Administrator's approval of

³³ For example, the federal primary standard for sulfur dioxide emissions was 80 micrograms per cubic meter as an annual arithmetic mean. The secondary NAAQS was 60 micrograms per cubic meter. Ohio's regulations provided for the adoption of this 60 micrograms standard as the only standard and required its attainment within three years. OHIO EPA, HEARING EXAMINER'S REPORT AND RECOMMENDATIONS *in re* CONSOLIDATED ELECTRIC UTILITY CASES, Case Nos. 73-A-P-120, *et al.*, at 17-18 (1974) [hereinafter cited as OHIO HEARING EXAMINER'S REPORT].

³⁴ The Administrator's approval is published at 37 Fed. Reg. 10,842, 10,886 (1972).

³⁵ The electric utilities and the steel mills are the largest sources of sulfur dioxide emissions, a byproduct of burning fossil fuels such as coal. A recent EPA report noted that several major source categories are not achieving compliance, including: coal-fired power plants, iron and steel facilities and coking plants, and primary smelters. These facilities account for one-third of all particulates and two-thirds of all sulfur dioxide emissions. ENVIR. REP. (BNA), 7 *Current Dev.* 364 (June 25, 1976). Richard Ayres, attorney for Natural Resources Defense Council, Inc. has indicated that, "[C]ontrolling emissions from power plants, especially those burning coal, is the most important regulatory problem faced by EPA." Ayres, *Enforcement of Air Pollution Controls on Stationary Sources Under the Clean Air Amendments of 1970*, 4 *ECOLOGY L.Q.* 441, 443 (1975).

³⁶ Ohio EPA Regulations AP-3-04, AP-5-04, AP-7-03. ENVIR. REP. (BNA), 2 *State Air Laws* 476:0541 -0621 (1975).

³⁷ The reduction in the standard was the result of federal intervention. The proposed federal regulations set the standard at 80 micrograms per cubic meter as an annual arithmetic mean. Final promulgation occurred in August, 1976, with compliance three years from the date of promulgation. Of course, the 1979 deadline appears optimistic, since a challenge has been filed in the Sixth Circuit. See notes 62-64 *infra* and accompanying text.

³⁸ 42 U.S.C. § 1857h-5(b)(1) (1970) reads in relevant part:

A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

For a general explanation of this provision, see text accompanying note 65 *infra*.

³⁹ 481 F.2d 162 (6th Cir. 1973).

those two state plans. The Sixth Circuit found that section 553 of the Administrative Procedure Act⁴⁰ required the Federal Administrator to conduct a hearing for interested parties before approving a state implementation plan, even though hearings had been held at the state level. The decision in *Buckeye Power* had the effect of nullifying federal approval of the two state plans. This decision has been strongly criticized,⁴¹ and it would now appear to be settled that such a duplication at the federal level is neither envisioned by the Clean Air Act nor required by the Administrative Procedure Act.⁴²

In the meantime, the Ohio EPA, the state agency responsible for the administration of Ohio's SIP, determined that its state plan had been too demanding and sought a two-year delay from the federal agency. When the request for a delay was denied, the Ohio EPA decided that an alternative method had been presented by the decision in *Buckeye Power*. The agency withdrew the ambitious plan, formulated under heavy citizen pressure, and submitted a "new" plan with substantially lower standards.⁴³ The date for attainment of this new plan would be

⁴⁰ *Id.* at 170-71. 5 U.S.C. § 553(c) (1970) provides:

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments with or without opportunity for oral presentation. . . . When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

⁴¹ For sources of such criticism see note 168 *infra*.

⁴² Section 110(a)(1), 42 U.S.C. § 1857c-5(a)(1) (1970), dictates that each state give reasonable notice and provide a hearing for interested parties before adopting and submitting the state plan to the Administrator. Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2), requires the Administrator to make a finding that the plan was adopted after reasonable notice and a hearing. If the state fails to submit a plan or if no public hearing has been held, section 110(c), 42 U.S.C. § 1857c-5(c), requires the Administrator to provide hearings for interested parties in that state.

Because the language of the Act clearly specifies the balance between federal and state authority in this area, the only problems which may arise would appear to concern the compatibility of the Clear Air Act provisions with those of the Administrative Procedure Act (A.P.A.), 5 U.S.C. §§ 551-559 (1970). *Appalachian Power Co. v. EPA*, 477 F.2d 495 (4th Cir. 1973) held that Congress had, in effect, determined that federal hearings would be unnecessary where adequate state hearings had been provided. According to the Fourth Circuit, this finding satisfied the requirements of section 553(b)(3)(B) of the A.P.A. *Duquesne Light Co. v. EPA*, 481 F.2d 1 (3d Cir. 1973) was in accord, but found that under the circumstances of that case a truly meaningful hearing had not been provided to the petitioners at the state level. *Id.* at 8-9. *Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839 (7th Cir. 1975), following *Appalachian Power*, concluded that the Fourth Circuit's interpretation comports with due process. *Id.* at 847. The court in *Buckeye Power* implicitly found that any hearings at the state level would be inadequate to protect petitioner's interests against possible federal enforcement. See note 196 *infra*. The conclusion that only a state hearing is required finds support in Currie, *Federal Air-Quality Standards and Their Implementation*, 1976 A.B.F. RES. J. 365, 370-71.

⁴³ As a result of a subsequent challenge to portions of a new Ohio plan before the Ohio Environmental Board of Review, an independent body which hears appeals regarding any action of the Ohio EPA Director, certain 1973-74 interoffice memoranda were made part of the public record. These documents reveal the development of a strategy between the state government and the Ohio EPA, which culminated in a letter to the Chief of Staff from the Director of the Ohio EPA. This letter was dated August 9, 1973, approximately 1½ months after *Buckeye Power* was decided. Noting that a requested two-year delay had been denied by the federal agency, the letter stated:

It is our intention now to seek a two-year delay by other means. The most promising possibility appears to lie in the recent Federal court decision in *Buckeye*

set for three years from the date of federal approval. This enabled the utilities and the Ohio EPA to, in essence, obtain a two year delay,⁴⁴ and a considerable relaxation of the requirements for pollution control.

The legality of this strategy was questionable. Congress had provided several specific ways in which a delay could be obtained. For example, under section 110(e)(1), upon application of the Governor, a state could obtain a two-year extension at the outset.⁴⁵ A number of states did request and were granted this two-year extension. Secondly, the Act provided for source-specific "postponements" for a one-year period, again, upon application of the Governor.⁴⁶ Thirdly, the state could have revised its plan as long as it continued to meet the requirements met at the time of its initial approval.⁴⁷ Although the submission of an entirely new plan was not provided for in the Act, it was argued that a "revision" of Ohio's plan could not be made; revisions apply only to approved plans, and the Administrator's approval of the Ohio plan had been declared null and void by the Sixth Circuit.⁴⁸

When the *Buckeye Power* case was decided in June 1973, Ohio had already commenced work on a plan to "subregionalize" the state's Air Quality Control Regions for the control of sulfur dioxides.⁴⁹ It was, therefore, decided that the Governor would write a letter to the federal EPA withdrawing the sulfur dioxide portion of Ohio's new plan. The other portions of the plan were proposed by the state in November 1973,⁵⁰ and approved with some exceptions in April 1974.⁵¹ Thus, compliance with those portions of the plan would be required in April 1977, three years from the date of federal approval.⁵²

Power et al. v. EPA. . . . At present, there is no legally approved Implementation Plan for the State. It is our intention to submit the Plan again, with some necessary changes which we are presently working on, as though it were an entirely new submittal. . . . Since federal regulations permit attainment dates to be set at three years from the date of approval of the Implementation Plan (which we anticipate to come in January, 1974), the new date for attainment of the standards would then be set at January, 1977.

Environmental Board of Review, EBR Case Nos. 74-6 through 74-10, *Appendix A* at File VI, Packet D (1974).

⁴⁴ *Id.* They estimated that the new attainment date would be 1977 rather than 1975.

⁴⁵ 42 U.S.C. § 1857c-5(e)(1) (1970).

⁴⁶ Section 110(f)(1), 42 U.S.C. § 1857c-5(f)(1) (1970).

⁴⁷ Section 110(a)(3), 42 U.S.C. § 1857c-5(a)(3) (1970). See discussion of *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), *supra* note 10, for the Supreme Court's interpretation of this provision.

⁴⁸ The proper course would probably have been to require the Administrator to republish the same plan, but to allow a period of time for public comment before reapproval. The Sixth Circuit opinion supports this solution: "The approval of the Ohio and Kentucky plans by the Administrator pursuant to 42 U.S.C. § 1857c-5(a)(2) (1973 Supp.) must therefore be deferred until such time as the Administrator complies with Section 553 of the APA." *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 171 (6th Cir. 1973).

⁴⁹ This subregionalization plan was, apparently, first proposed in July 1972, and was well underway by August, 1973, when the Governor withdrew the sulfur dioxide portion of the plan. See Environmental Board of Review, EBR Case Nos. 74-6 through 74-10, *Appendix A* (1974).

⁵⁰ 38 Fed. Reg. 31,543 (1973).

⁵¹ 39 Fed. Reg. 13,539 (1975). The Administrator specifically rejected the sulfur dioxide provision since none was included in the approved state plan.

⁵² See note 36 *supra*.

It was believed that Ohio would be able to submit its subregionalization plan for sulfur dioxides before the federal Administrator was required to promulgate one for the state under section 110(c).⁵³ The plan for sulfur dioxides was indeed submitted in May 1974, but was overturned in September by the Ohio Board of Environmental Review. The plan was found to have been adopted with grossly insufficient public notice of the far-reaching impact of its revisions. In addition, specific portions of the regulations were found to be "unlawful and/or unreasonable."⁵⁴ It was found that the subregionalization plan had further divided the Air Quality Control Regions established by the federal government along county lines without regard for the factors normally considered when instituting control regions.⁵⁵ This was construed as an attempt to modify Ohio's Air Quality Control Regions to accommodate industry, an alteration which defeated the purpose of those regions.⁵⁶

It, therefore, became incumbent upon the federal agency to promulgate a sulfur dioxide plan for the state.⁵⁷ This should have been accomplished within six months after Ohio submitted the remainder of its plan in November 1973. In March 1975, when no plan had yet been proposed, the Natural Resources Defense Council, Inc., an active litiga-

⁵³ Section 110(c), 42 U.S.C. § 1857c-5(c) (1970), provides that if a state fails to submit a plan, or portion thereof, the Administrator *shall* prepare and publish proposed regulations within six months after the required date for submission of the plan. In an inter-office communication, dated August 22, 1973, between the Director of Ohio EPA and the Governor of Ohio, the Director stated:

U.S. EPA will be forced to disapprove that portion of our plan and begin promulgation of its own sulfur oxides control strategy for Ohio. It is our expectation that by the time they develop such a strategy Ohio EPA will have completed its present work to develop a revised strategy. Then the Ohio strategy could be promulgated by U.S. EPA in the Federal Register at the same time that Ohio EPA is holding hearings on that strategy in the state.

Environmental Board of Review, EBR Case Nos. 74-6 through 74-10, *Appendix A*, File V, Packet I (1974).

⁵⁴ Environmental Board of Review, EBR Case Nos. 74-6 through 74-10 at 120 (1974).

⁵⁵ The Environmental Board of Review exhaustively discussed the legislative history of the Act as it relates to the concept of Air Quality Control Regions. *Id.* at 123-31. Generally, the Board found that the Air Quality Control Regions were to include all communities which share common air pollution problems based on meteorological, topographical, and urban-industrial factors.

⁵⁶ *Id.* at 179, Findings of Fact:

(19) The certified record viewed as a whole, contains substantial reliable and probative evidence to support the statement of the counsel for the Director that the main motivation for much of the material developed in this record was to seek an accommodation with the electric utility companies and other large industrial sources;

(2) The sub-regionalization program, being based essentially on the motivation to accommodate the large sources, amounts to an alteration of the lawfully designated air quality control regions which is not consistent with the characterization of the air quality control regions found in the 1970 Amendments of the Federal Clean Air Act and its associated legislative history.

⁵⁷ Section 110(c), 42 U.S.C. § 1857c-5(c) (1970) provides that the Administrator *shall* prepare and publish proposed regulations for a state if: (1) the state fails to submit a plan; (2) the plan or portion thereof submitted is disapproved; or (3) if the state fails to revise the plan when required. If the state held no hearings then the Administrator must conduct hearings in that state. The Administrator must act within six months from the required date for submission of the plan or portion thereof by the state.

tor in the area of environmental affairs, informed the Administrator of its intention to bring suit under section 304 of the Clean Air Act.⁵⁸ The response, by letter, followed several months later, and suggested that promulgation was anticipated before the end of that year.⁵⁹ In October 1975, the Northern Ohio Lung Association, a local chapter of the American Lung Association, filed suit in federal court pursuant to section 304, the citizen enforcement section, seeking to enforce the mandatory duty of the Federal Administrator under section 110(c). The question was mooted when the proposed regulations were published on November 10, 1975.⁶⁰ Public hearings on the proposals were held at four locations throughout the state in January 1976, and the revised regulations were issued in August 1976,⁶¹ a full two years after the approval of the other portions of Ohio's plan in 1974. Assuming that everything proceeded smoothly after promulgation, final compliance with the sulfur dioxide portion of the state's plan would occur three years from that date, in 1979.

A rough road, however, is expected.⁶² The federal regulation as finally promulgated is again subject to a section 307 challenge for judicial review of the Administrator's action by any interested party. Petitions have been filed by most of the state's electric utilities and the steel industry; challenges have also been instituted by two Ohio-based environmental groups.⁶³ A stay of enforcement has been granted by the Sixth Circuit.⁶⁴

III. POSSIBLE CHALLENGES TO THE FEDERAL REGULATIONS

Section 307(b)(1) provides for judicial review of certain actions of the Administrator including promulgation of any national air quality

⁵⁸ Letter from Richard E. Ayres, Attorney for Natural Resources Defense Council, to Russell E. Train, Administrator, Environmental Protection Agency (March 24, 1975). Section 304(a)(2), 42 U.S.C. § 1857h-2(a)(2) (1970) is the Citizen Suit provision of the Clean Air Act and provides that any person may commence a suit: "(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is *not discretionary* with the Administrator." (Emphasis added.) The Administrator's duty under section 110(c) is not discretionary since that language provides that the Administrator "shall" promulgate the regulations for the state.

⁵⁹ Letter from Valdas V. Adamkus, Acting Regional Administrator, to Richard E. Ayres and Cullen Phillips of the Natural Resources Defense Council (September 2, 1975).

⁶⁰ 40 Fed. Reg. 52,410 (1975).

⁶¹ 41 Fed. Reg. 36,323 (1976).

⁶² In an interview with the new regional head of the federal EPA for Region V, of which Ohio is a part, the new regional administrator stated: "We know we will be sued on it [the Federal Regulations] regardless of what kind of plan we come out with. We will have one that is defendable in court." Cleveland Press, May 3, 1976, at 12, col. 1.

⁶³ *Buckeye Power, Inc. v. EPA*, Nos. 76-2090, 76-2211, 76-2217, 76-2222, 76-2223, 76-2224, 76-2225, 76-2227, 76-2228, 76-2229, 76-2230, 76-2231, 76-2232, 76-2236, 76-2237, 76-2238, 76-2239, 76-2240, 76-2241, 76-2242, 76-2243, 76-2244, 76-2247, 76-2249, 76-2251, 76-2258, 76-2275, 76-2276, 76-2278, 76-2280, 76-2281, 76-2282, 76-2288, 76-2289, 76-2290, 76-2291 (6th Cir., filed August 23, 1976) [hereinafter cited as *Buckeye Power, Inc. v. EPA*, Nos. 76-2090 et al.].

⁶⁴ *Buckeye Power, Inc. v. EPA*, Nos. 76-2090 et al. (6th Cir. Nov. 12, 1976) (order granting a stay of enforcement in order to permit "[c]omments relating to clerical or computational errors" and appropriate amendments by the respondents, EPA. Petitioners are prohibited from submitting new emissions, process, or air quality data).

standard, approval of a state plan, or promulgation of a plan for a state pursuant to section 110(c). The petition for review must be filed in the appropriate federal court of appeals within 30 days of the Administrator's action. Appeals brought after that 30-day period are permitted only if new grounds for review arise after that time. Section 307(b)(2) forecloses review during enforcement proceedings of any matter that should have been raised in a section 307(b)(1) petition.

No indication of the scope of review under section 307(b)(1) is given in the language of the statute or in its legislative history. It has been generally accepted that the Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe*⁶⁵ limits the scope to a determination of whether the Administrator's action was arbitrary, capricious, or an abuse of discretion. A number of issues which have been raised in other section 307 challenges and which are likely to be raised as challenges to the federal sulfur dioxide regulations promulgated for Ohio are discussed below.

A. Regulations More Stringent Than Necessary

The recently promulgated federal regulations for control of sulfur dioxide emissions in Ohio are designed to bring the state's air quality within the national primary ambient air quality standard. Ohio had originally expressed a desire to achieve the more stringent secondary standard within the three-year deadline.⁶⁶ However, the federal EPA contended that it had authority only to promulgate a plan which would meet the minimum requirements of section 110(a)(2). In other words, the plan as promulgated by the federal agency does not provide for reductions in emissions beyond those necessary to attain the primary standard within three years. The more stringent state standard has therefore been discarded. Most interested parties agree that this approach represents a reasonable interpretation of the role of the federal agency.⁶⁷

As will be seen, challenges to state plans on the grounds that they are more demanding than necessary to meet the national standards are clearly foreclosed; however, challenges to federal regulations on this same ground are likely to succeed. Though a state is entitled to set more stringent standards than are necessary to achieve and maintain the level of air quality required by the federal government, this is strictly a policy decision reached by each state's legislature. Congress, by virtue of sec-

⁶⁵ 401 U.S. 402 (1971).

⁶⁶ See text at note 33 *supra*.

⁶⁷ For support of this position see Luneburg, *Federal-State Interaction under the Clean Air Amendments of 1970*, 14 B.C. IND. & COM. L. REV. 637, 659-60 (1973). Currie, *supra* note 42 at 379, similarly commented: "There is only one reason for the administrator to impose a federal implementation plan on the polluters—to assure compliance with the air-quality standards; if he imposes . . . standards that are more stringent than necessary to this end, he has exceeded his statutory authority." See also *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974), where the court ordered a new hearing to allow petitioners to present their claims that the emission reductions proposed by EPA were not necessary to meet national air quality standards.

tion 116, plainly intended that the state should have the right to set such rigorous standards,⁶⁸ a prerogative twice confirmed by the Supreme Court.⁶⁹ The Administrator is not permitted to disapprove a more stringent state plan on the grounds that the plan is economically or technologically infeasible, or because it is not necessary to attain the national standards, since either approach would supplant the state's right to set a higher priority for the health of its citizens.⁷⁰ In reviewing a state's plan, the federal agency's duty is to determine that it will provide at least the minimum level of air quality necessary to protect the public health.

The Supreme Court has not fixed the scope of the federal agency's authority when promulgating a plan for a state under section 110(c).⁷¹ It can, however, be inferred from the decisions of the Court and from the federal-state nature of the Act that the agency's authority does not include adoption of more stringent standards than necessary to meet the minimum requirements of section 110(a)(2). There is an even stronger case for this construction of the Administrator's duty in Ohio, where the state has already expressed an intention to retreat from its earlier, more ambitious plan. The Supreme Court has held that a state may reconsider and adopt less stringent standards as long as the national standard is not threatened.⁷²

⁶⁸ 42 U.S.C. § 1857d-1 (1970) provides that:

[N]othing in this Chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect . . . such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

Legislative history indicates that Congress intended that the states should be able to set more stringent standards than required to achieve the national air quality standards. See note 5 *supra*. For an argument in favor of this interpretation of the statutory section, see Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Statutory Sources*, 89 HARV. L. REV. 316, 321 (1975).

⁶⁹ In *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), the Supreme Court held that the states could grant individual polluters variances so long as the national standards were not thereby threatened, thus implying that the state's standards must have originally been more stringent than necessary. See note 10 *supra*. In *Union Elec. Co. v. EPA*, 96 S. Ct. 2518 (1976), the Court expressly held that a state "may adopt emission standards stricter than the national standards." It relied on section 116 of the Act to support this conclusion. *Id.* at 2528.

⁷⁰ *Union Elec. Co. v. EPA*, 96 S. Ct. 2518, 2528-29 (1976).

⁷¹ *Id.* at 2527 n.7.

⁷² See note 69 *supra*. Congress has also indicated that the states may reduce their standards if such reduction does not interfere with attainment of the national standards. The Energy Supply and Environmental Coordination Act of 1974, see note 9 *supra*, which amends section 110 of the Clean Air Act, states that the Administrator shall approve any revision of a state plan if he finds that it satisfies the requirements of section 110(a)(2). 42 U.S.C. § 1857c-5(a)(3)(A) (Supp. IV 1974) (amending 42 U.S.C. § 1857c-5(a) (1970)). It further provides that the Administrator shall review all of the state plans and report to the state any possible revision which could lessen the burden on fuel burning sources without interference with the national standards. 42 U.S.C. § 1857c-5(a)(3)(B) (Supp. IV 1974) (amending 42 U.S.C. § 1857c-5(a) (1970)). There is no requirement, however, that the state submit such a revision. Thus, Congress promoted the state's right to require a higher standard of air quality for its citizens.

It is evident that industry challenges directed essentially at the stringency of a state plan will gain little success in federal courts.⁷³ Industry's recourse will lie with the state.⁷⁴ If the state is cooperative, a variance or revision of the state plan may be obtained, and the EPA will approve the change if the national standard is not thereby endangered.⁷⁵ Unlike plans adopted by the states, provisions enacted by the federal agency pursuant to the mandatory duty of section 110(c) may be challenged on grounds that they are more stringent than necessary to meet the national primary standards since the federal government does not have the same prerogative as the states under section 116.

The interested parties to the Ohio sulfur dioxide regulations have, at least, impliedly agreed with this basic assumption. The disagreement will more likely be centered on whether the federally imposed regulations, which are based upon computer models, accurately predict the minimum amount of emissions reductions required to meet the primary standard.⁷⁶ The utilities and the Ohio EPA contended that the proposed regulations would result in "overkill"⁷⁷ or reductions in emissions that are "unreasonable or unnecessary"⁷⁸ to achieve the national standard. By contrast, the Natural Resources Defense Council predicted that the

⁷³ Amici in the *Union Electric* case argued that the Administrator could reject a plan that was too strict. 96 S. Ct. at 2527.

⁷⁴ Such a solution was suggested by the federal agency, Brief for Respondent at 10, and adopted by the *Union Electric* Court, 96 S. Ct. at 2529-30, relying on *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975).

⁷⁵ While the state is considering such alterations and has stayed enforcement against the industries that will be affected, federal enforcement is, of course, a potential hazard. This was the situation in *Union Elec. Co. v. EPA*, 515 F.2d 206 (8th Cir. 1975), and in *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1973), where petitioners had filed for state variances. See discussion *infra* at notes 152-56 and accompanying text. By contrast, some commentators have argued that the federal agency can only enforce those emission limitations necessary to attainment of the national standards. See, e.g., Currie, *supra* note 42, at 399. However, this conclusion is not supported by the Supreme Court's most recent decision, *Union Elec. Co. v. EPA*, 96 S. Ct. 2518 (1976). In *Union Electric* the Court rejected petitioner's argument that states wishing to elect more stringent standards must do so independently of the plan adopted for federal approval. *Id.* at 2528-29. The Court found that "two sets of emission standards, one federally approved plan and one stricter state plan" are not required by the Clean Air Act and would impose a "wasteful burden" on the states and on the EPA. Absent two sets of emission standards, federal enforcement at the minimal level required to meet the national standards would impose a tremendous burden upon the Administrator. The more appropriate view appears to be that the agency has authority to enforce any provision of an applicable state implementation plan, since such plans have the force and effect of federal law.

⁷⁶ Computer modeling is used to predict the amount of emission reductions in a given area requisite for compliance with the national ambient air quality standards. For a criticism of such techniques see Ayres, *Enforcement of Air Pollution Controls on Stationary Sources Under the Clean Air Amendments of 1970*, 4 *ECOLOGICAL L.Q.* 441, 469 (1975).

⁷⁷ Testimony Presented by Ohio Environmental Protection Agency to United States Environmental Protection Agency in a Public Hearing on the Proposed Sulfur Dioxide Control Strategy for the State of Ohio on January 13, 1976 at Section II. C. 3 [hereinafter cited as Statement of Ohio EPA].

⁷⁸ The Statement of the Cleveland Electric Illuminating Company for Presentation at Public Hearings in Cleveland, Ohio on January 6, 1976 Relative to Proposed Federal EPA Sulfur Dioxide Regulations for Ohio at 8-12. But cf. Bleicher, *Economic and Technical Feasibility in Clean Air Enforcement Against Stationary Sources*, 89 *HARV. L. REV.* 316, 326 (1975).

minimum national primary standard would not be met under the proposed federal regulations due to inadequate modeling techniques employed by the EPA.⁷⁹

In *Texas v. EPA*,⁸⁰ the Fifth Circuit was faced with a challenge to the federal agency's use of modeling techniques which depend on projections and assumptions rather than actual data. The court took a sensible view of the situation and determined that such methods were necessary; that the modeling was essentially neutral in that the margin for error cut both ways; and that the agency would remain under a "continuing responsibility to develop, review and apply updated and more sophisticated information."⁸¹ In *South Terminal Corp. v. EPA*, the First Circuit, though remanding to the EPA, stated that the revised plan should contain provisions for adjustment in light of changing data.⁸² It should be noted, however, that other courts have been less willing to accept the EPA's methodology.⁸³

B. Continuous Emission Limitations

Another possible challenge to the federal regulations revolves around the selection of continuous emission limitations over either intermittent controls or dispersion enhancement techniques. Continuous emission limitations reduce the actual volume of pollutants emitted into the air at a constant rate.⁸⁴ Intermittent controls, a method advocated by industry, reduce the amount of emissions at those times when the pollution levels become dangerously high.⁸⁵ Dispersion enhancement techniques do nothing to reduce the amount of pollution entering the atmosphere; rather they reduce the concentration in the immediate vicinity of the plant by dispersing the pollutants over a wider area.⁸⁶

Three circuits have considered the appropriateness of these three methods and have consistently found continuous emission limitations

⁷⁹ Statement of Richard Ayres, *supra* note 29, at 8-9.

⁸⁰ 499 F.2d 289 (5th Cir. 1974), *cert. denied, sub. nom.* Exxon Corp. v. EPA, 96 S. Ct. 3191 (1976).

⁸¹ *Id.* at 301 n.16. This result has been cited with favor in Kennecott Copper Corp. v. Train, 526 F.2d 1149, 1152-53 n.16 (9th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

⁸² 504 F.2d 646, 666 (1st Cir. 1974).

⁸³ *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973). The circuit court remanded to the agency for supplementation of its record in support of its decision not to accord automobile manufacturers one-year extensions. The court held that the Administrator bears the burden of establishing the reasonableness and reliability of his methodology. *Id.* at 648.

⁸⁴ Continuous emission limitations may be accomplished by one of two methods. First, a device may be installed in the smokestacks to extract the pollutants before the gases are emitted. For particulates the device is a precipitator; for sulfur dioxide, flue gas desulfurization, or scrubbers, are used. Secondly, emissions may be reduced by modifying the fuel; for example, the state may require that only low sulfur coal or oil be used.

⁸⁵ This method would provide for switching to low sulfur fuel or reducing operations during times of alert.

⁸⁶ Dispersion is effectuated through a combination of tall smokestacks and a varying of emissions dependent upon the strength of prevailing winds. In other words, tall smokestacks decrease the ground level of pollution in the immediate vicinity of the plant by dispersing the particles over a wider area. This method can be coupled with a type of intermittent control when the winds slacken during an inversionary period.

to be the preferred control method.⁸⁷ Their conclusions have been based upon a number of factors. First, the language of the statute supports the position that measures other than emission limitations are to be used only when "necessary to insure attainment and maintenance" of the NAAQS.⁸⁸ Cases decided since *Train v. Natural Resources Defense Council, Inc.*,⁸⁹ have found further support in the Supreme Court's use of the term "composition" of emissions, which implies control of the amounts of pollutants as well as their concentration.⁹⁰ The Energy Supply and Environmental Coordination Act of 1974,⁹¹ which amended the Clean Air Act in response to the 1973 oil embargo and energy crisis, and the proposed Conference Report definition of emission limitations,⁹² both reaffirm the use of continuous emission limitations.⁹³ Finally, the use of dispersion enhancement techniques has been found to run contrary to the nondegradation policy of the Clean Air Act.⁹⁴ This policy is generally understood to mean that, in areas where the air is already cleaner than required by the NAAQS, the state should not allow the air to significantly deteriorate.⁹⁵

⁸⁷ *Kennecott Copper Corp. v. Train*, 526 F.2d 1149 (9th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *Big Rivers Elec. Corp. v. EPA*, 523 F.2d 16 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390, 403-11 (5th Cir. 1974), *rev'd in part on other issues sub. nom. Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975).

⁸⁸ Section 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B) (1970), provides that for state implementation plans to be approved by the Administrator, the plans must include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard." See *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390, 406-07 (5th Cir. 1974). For an argument that the definition of emission limitations be broadened to encompass tall stacks, see Currie, *supra* note 42 at 375-77.

⁸⁹ 421 U.S. 60 (1975).

⁹⁰ The Sixth Circuit emphasized the significance of the Supreme Court's use of the term "composition" in its definition of emission limitations. Because "composition" was defined as relative to the "kind" and "amount" of substances emitted, the court concluded that: "Under this definition a rule or regulation pertaining to sulfur dioxide or any other contaminant, would qualify as an emission limitation only if it regulates the amount of that kind of material which may be included in the emission from a given source." *Big Rivers Elec. Corp. v. EPA*, 523 F.2d 16, 21-22 (6th Cir. 1975) (emphasis in original). The Ninth Circuit supported the position taken by the Sixth Circuit in *Kennecott Copper Corp. v. Train*, 526 F.2d 1149, 1155 (9th Cir. 1975).

⁹¹ 42 U.S.C. § 1857c-10 (Supp. IV 1974) (amending 42 U.S.C. §§ 1857-1858a (1970)).

⁹² The definition provides that "[t]he terms 'emission limitation' and 'emission standard', and 'standard of performance' mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including a detailed schedule and timetable of compliance." CONF. REP. NO. 1742, 94th Cong., 2d Sess. § 301 (1976) (amending § 302(i)(1), 42 U.S.C. § 1857(h) (1970)) (emphasis added). The Committee Notes indicate that this provision is meant to clarify and reaffirm existing law. *Id.* at 113.

⁹³ Congress unsuccessfully attempted to provide for intermittent control strategies as a permanent method. For an excellent discussion of the legislative history of these amendments as they relate to intermittent controls, see *Kennecott Copper Corp. v. Train*, 526 F.2d 1149, 1156-60 (9th Cir. 1975).

⁹⁴ *NRDC v. EPA*, 489 F.2d 390, 408-09 (5th Cir. 1974). This finding appears implicit in the Ninth Circuit's opinion, see *Kennecott Copper Corp. v. Train*, 526 F.2d 1149, 1153 n.18 (9th Cir. 1975); *Big Rivers Elec. Corp. v. EPA*, 523 F.2d 16, 21 (6th Cir. 1975).

⁹⁵ The Congress is presently considering definitions of a nonsignificant deterioration policy. See discussion at notes 244-60 *infra* and accompanying text. Support for the

The federal regulations for Ohio employ continuous emission limitations. An industry challenge on this point appears highly unlikely since the Sixth Circuit has already indicated that this is the preferred control method.⁹⁶ The interesting twist to this issue in Ohio is the allegation by the Natural Resources Defense Council that the federal regulations will have the effect of merely dispersing *polluters* more evenly throughout the state, thus violating the nondegradation policy in those cleaner areas of the state. NRDC's argument results from the federal agency's decision to impose only emission limitations as stringent as necessary to attain the primary national standard. This approach, NRDC contends, will "maximize" emissions in all areas of the state up to the standard and jeopardize the policy of nondegradation since new pollution sources will move away from presently polluted areas into areas where the concentrations are currently much lower than the national standard. Thus, rather than actually reducing emissions, the projected result is the dispersion of pollution more evenly throughout the state at a level just below the national standard for clean air.⁹⁷

C. Federal or State Enforcement

The Ohio EPA has indicated that it has "doubtful authority" to enforce the federal sulfur dioxide regulations.⁹⁸ Since the federal EPA's primary concern is prompt compliance with the regulations, it is expected that the federal agency will expeditiously enforce its own "federal compliance schedule."⁹⁹ It is anticipated, however, that the state agency will eventually hold public hearings to adopt the federal regulations, or a modified, acceptable version of those regulations, as state law thereby resuming state enforcement. The federal agency would probably wish to avoid a legal battle with an uncertain outcome in order to impose these enforcement duties upon an unwilling state.¹⁰⁰

The outcome of such a legal battle, if necessary, is an open question.

existence of such a policy may be found in: section 101(b)(1), 42 U.S.C. § 1857(b)(1) (1970); the Supreme Court's decision of *Fri. v. Sierra Club*, 412 U.S. 541 (1973); and Note, *Review of EPA's Significant Deterioration Regulations: An Example of the Difficulties of the Agency-Court Partnership in Environmental Law*, 61 VA. L. REV. 1115 (1975).

⁹⁶ *Big Rivers Elec. Corp. v. EPA*, 523 F.2d 16 (6th Cir. 1975).

⁹⁷ Statement of Richard Ayres, *supra* note 29, at 5-6. This is a novel idea, as yet untested in the courts. Moreover, it focuses on one of the potentially serious effects of the establishment of national standards — the possibility that the standards will become the norm, rather than the minimum level for clean air.

⁹⁸ Statement of Ohio EPA, *supra* note 77. The agency offers no explanation concerning the reasons why they consider their authority to be "doubtful." The Act supports the proposition that federal regulations adopted in accordance with section 110(c), 42 U.S.C. § 1857c-5(c) (1970), become integrated into the state implementation plan and therefore, are enforceable by the states.

⁹⁹ 40 Fed. Reg. 52,410 (1975).

¹⁰⁰ The federal agency's expected reluctance to take action against Ohio for its failure to enforce the federal regulations is attributable to two factors. First, Ohio has been lax in the adoption of sulfur dioxide regulations, and there is no evidence that it would be any less so in the enforcement. Secondly, at the public hearings held in January 1976, the federal agency's primary concern appeared to be to avoid any further delay in enforcement resulting from further litigation.

While Congress expected that the states would assume primary responsibility for promulgation and enforcement,¹⁰¹ they did not provide any sanctions against a state that failed to assume the legislative and administrative responsibilities delegated by the Act to the states. The real issue is whether Congress could constitutionally compel the states to perform what is essentially a governmental function. The Act itself appears to contemplate voluntary compliance by the states.¹⁰²

The issue has arisen thus far in situations in which the Administrator promulgated a transportation plan, or portion thereof, for a state that had failed to submit an appropriate plan. Included within the plans which have been challenged was a regulation to the effect that the state is required to enforce the plan. By including this atypical provision within the implementation plan, the EPA argues that a state which fails to comply with this provision is subject to potential civil or criminal penalties under section 113, the federal enforcement provision. There have been four circuit court decisions on point; the Supreme Court has granted review in the three most recent cases to determine the statutory and constitutional authority for the EPA's unusual regulation.¹⁰³ While all parties agree that federal regulation of pollution is within the commerce powers of Congress,¹⁰⁴ the EPA maintains that the additional requirement, that states legislatively adopt the federal regulations and assume enforcement responsibility or be held in violation of the plan and subject to federal enforcement proceedings, is also within those powers. The states, on the other hand, contend that legislative enactments and their enforcement are governmental functions reserved to the states via the tenth amendment and therefore not within the powers granted to Congress by the commerce clause.

The first case to consider the issue was *Pennsylvania v. EPA*.¹⁰⁵ Pennsylvania submitted its transportation control plan which was approved in part and disapproved in part by the Administrator, who then proposed further regulations pursuant to his mandatory duty under section 110(c). The plan required Pennsylvania to promulgate analogous state regulations; these regulations would institute a program to retrofit pre-1968 vehicles with a special device to reduce hydrocarbon and carbon monoxide emissions. The Administrator attempted to invoke the

¹⁰¹ See note 8 *supra*.

¹⁰² See note 130 *infra* and accompanying text. For an interpretation of the statute that contemplates mandatory state compliance, see Salmon, *The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act*, 2 COLUM. J. ENVIR. L. 290 (1976).

¹⁰³ The first case on point was *Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974). The three subsequent cases, in which the Supreme Court granted certiorari, were: *Maryland v. EPA*, 8 E.R.C. 1105 (4th Cir. 1975), *cert. granted*, 426 U.S. 904 (1976); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *cert. granted*, 426 U.S. 904 (1976); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *cert. granted*, 426 U.S. 904 (1976). A New York District Court has held that, pursuant to section 304, citizen enforcement is only authorized in situations where the state is a polluter. *Friends of the Earth v. Carey*, 422 F. Supp. 638 (S.D.N.Y. 1976).

¹⁰⁴ See, e.g., *District of Columbia v. Train*, 521 F.2d 971, 988 (D.C. Cir. 1975); *Brown v. EPA*, 521 F.2d 827, 837 (9th Cir. 1975).

¹⁰⁵ 500 F.2d 246 (3d Cir. 1974).

federal enforcement procedures of section 113¹⁰⁶ against the commonwealth. In determining that the Administrator had such authority under section 113, the court stated that the underlying issue was whether Congress had the power to mandate state enforcement of either a federal or state-adopted implementation plan.¹⁰⁷

Before reaching the constitutional question, the court concluded that Congress did intend that states be subject to federal enforcement "in at least some cases." This conclusion was based on two grounds: that states are persons under the Act and that section 113 permits federal enforcement action when a violation of "any requirement" of a state plan has occurred.¹⁰⁸ By including in the federally promulgated state plan a provision which required state adoption and enforcement of the transportation provisions, a state which failed to comply could be held in violation of a requirement of its own plan.

This interpretation appears to be begging the question, since the real issue was whether the Administrator had the statutory authority to include such a provision in the state plan. Section 113 on its face does not appear to set forth a sanction against a state for failure to adopt or enforce provisions of the plan.¹⁰⁹ Even though the definitional section of the Act defines "person" to include states, municipalities, and state political subdivisions,¹¹⁰ a careful reading of section 113 tends to support a more narrow construction of the word — applied in accordance with that section to include only polluters who are in violation of the plan. Under this interpretation, a state may be held in violation if it is a polluter, but may not be so held for a mere failure to perform some purely governmental function. Two of the circuits have noted this alternative statutory construction but have reached different conclusions regarding when the state may be considered a polluter.

In *Brown v. EPA* the Ninth Circuit defined the state as a polluter

¹⁰⁶ 42 U.S.C. § 1857c-8 (1970) provides for two situations in which the Administrator may invoke these procedures. First, where the Administrator finds that conduct is violative of a state implementation plan, he *shall* so notify that violator and the state responsible for enforcement; thirty days thereafter, he *may* issue a compliance order or institute civil action. Secondly, where the Administrator determines that violations of a plan are "so widespread that they appear to result from a failure of the State in which the plan applies to enforce the plan effectively," he must give notice of such violations to that state. Thirty days after state notification, he must give public notice. Once public notice has been given, the Administrator *may* enforce that state plan until the state indicates its intention to resume enforcement. This procedure is referred to as the "period of federally assumed enforcement."

Federal enforcement may involve either the issuance of a compliance order, after the polluter has been given an opportunity to confer with the Administrator, or a civil action for permanent or temporary injunctive relief. The compliance order should "specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply." In the alternative the Administrator may seek injunctive relief in federal district court. In either case, the penalties are not in excess of \$25,000 per day of violation and/or one-year imprisonment.

¹⁰⁷ 500 F.2d at 256.

¹⁰⁸ *Id.* at 256-57.

¹⁰⁹ The section applies to "any person" who is in violation of "any requirement of an applicable implementation plan" and requires notice to the state as well as to the violator.

¹¹⁰ Section 302(e), 42 U.S.C. § 1857h(e) (1970).

when it owned or operated a direct source of pollution.¹¹¹ *District of Columbia v. Train* suggested that there are both direct and indirect sources of pollution and held that highways, for example, were "factors which influence use of pollution sources by other parties."¹¹² The court concluded that a provision to construct bus lanes and to purchase additional buses was appropriately enforceable against the states. The New York District Court, while apparently adopting the idea of indirect pollution sources, pointed out that the bus system was not a polluter but, more precisely, constituted a "useful tool in discouraging automobile traffic."¹¹³ The New York court upheld provisions, however, to eliminate on-street parking in New York City since its availability was found to be an indirect source of pollution.¹¹⁴ In *Maryland v. EPA*, the Fourth Circuit appears to have adopted the Third Circuit view that a state is a person under all sections of the Act,¹¹⁵ but disagreed with the Third Circuit result that section 113 permits federal enforcement against a state for failure to adopt a federally proposed plan.

At the constitutional level the Third Circuit's interpretation in *Pennsylvania v. EPA* is even less tenable. The court's statement that Congress may require states to exercise legislative and administrative powers is unsupported by authority.¹¹⁶ The Ninth,¹¹⁷ District of Columbia,¹¹⁸ and Fourth Circuits¹¹⁹ have all concluded that such an interpretation

¹¹¹ 521 F.2d 827, 832 (9th Cir. 1975).

¹¹² 521 F.2d 971, 983 (D.C. Cir. 1975). The view that highways are indirect sources of pollution is supported by the federal regulations. 40 C.F.R. § 52.22(b)(1)(i) (1975).

¹¹³ *Friends of the Earth v. Carey*, 9 E.R.C. 1007, (S.D.N.Y. 1976).

¹¹⁴ *Id.* at 1014. In addition to on-street parking, the court cited issuance of permits for new off-street parking and restraints on licensing of taxi cabs as possible indirect sources of pollution, or "factors which influence the use of pollution sources by others." *Id.* at 1013-15.

¹¹⁵ 8 E.R.C. 1105, 1112 (4th Cir. 1975).

¹¹⁶ 500 F.2d at 262. The conclusion appears to be based on the Third Circuit's interpretation of *Maryland v. Wirtz*, a case which has since been overruled. *Id.* at 261. See notes 121-25 *infra* and accompanying text.

¹¹⁷ The Ninth Circuit contended that in neither *Fri v. United States*, 421 U.S. 542 (1975), nor *Maryland v. Wirtz*, 392 U.S. 183 (1968), did the Court consider the precise question at issue here because in those cases, the states were found to have engaged in activity that substantially affected interstate commerce. The facts did not merit examination of the "state's exercise of its police power with respect to an economic activity which affects interstate commerce." The Ninth Circuit thus emphasized the distinction between a state engaging in commerce and a state merely regulating the commerce of its private citizens. 521 F.2d at 838 & n.45. The court stated that,

To treat the governance of commerce by the states as within the plenary reach of the Commerce Power would in our opinion represent such an abrupt departure from previous constitutional practice as to make us reluctant to adopt an interpretation of the Clean Air Act which would force us to confront the issue.

Id. at 839.

¹¹⁸ In the District of Columbia Circuit's view, the requirement that the states, as indirect sources of pollution, construct bus lanes and purchase more buses is analogous to the regulation of state-owned railroads upheld in *United States v. California*, 297 U.S. 175 (1936), but the states may not be required to administer and enforce federal regulations against individual automobile owners. Voluntary state cooperation or direct federal regulation are the only statutory and constitutionally available alternatives. *District of Columbia v. Train*, 521 F.2d 971, 989-93 (D.C. Cir. 1975).

¹¹⁹ The Fourth Circuit concluded that: "[I]f there is any attribute of sovereignty left

would render the Act unconstitutional as outside the commerce clause; therefore, those courts failed to find clear congressional intent for such a questionable statutory construction.¹²⁰

The Supreme Court has recently overruled the case of *Maryland v. Wirtz*¹²¹ upon which the Third Circuit relied for its broad interpretation of the commerce clause. The Supreme Court decision, *National League of Cities v. Usery*,¹²² suggests that federal regulations which "impermissibly interfere with the integral [state] governmental functions" should be construed as outside congressional commerce powers.¹²³ In interpreting the statute upheld in *Maryland v. Wirtz*, the *National League of Cities* Court ruled that the 1974 amendments to the Fair Labor Standards Act,¹²⁴ which extended federal minimum wage and maximum hour requirements to almost all state employees, was an unconstitutional infringement on state policymaking in the area of "administering the public law and furnishing public services."¹²⁵ In *National League of Cities* the state was an employer with the requisite effect upon commerce.¹²⁶ Therefore, the Supreme Court's analysis would appear to be a highly restrictive definition of the commerce powers, since that Court failed to distinguish between a state engaged in economic activity affecting commerce, a category including a state polluter, and state regulation of the economic activity of others. The concurring opinion suggested that a balancing test would be employed when Congress attempts to regulate state-related commerce and noted that the decision "does not outlaw federal power in areas such as environmental protection, where the fed-

to the states it is the right of their legislatures to pass, or not to pass, laws." 8 E.R.C. at 1112.

¹²⁰ See, e.g., *District of Columbia v. Train*, 521 F.2d 971, 984 (D.C. Cir. 1975); *Brown v. EPA*, 521 F.2d 827, 834-36, 839 (9th Cir. 1975). The Southern District of New York has followed suit. *Friends of the Earth v. Carey*, 422 F. Supp. 638, 643-44 (S.D.N.Y. 1976).

¹²¹ 392 U.S. 183 (1968). This case upheld the 1966 amendments to the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1970), which removed the exemption for state employees in hospitals, institutions, and schools.

¹²² 96 S. Ct. 2465 (1976).

¹²³ *Id.* at 2473. In striking down the 1974 amendments to the Fair Labor Standards Act the Court held "that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3." *Id.* at 2474.

Friends of the Earth is the first case to reach the question of the constitutional breadth of the commerce power since the decision in *National League of Cities*. In the district court's view, the *National League of Cities* decision strengthened the argument that an interpretation of section 113 or 304 of the Clean Air Act, which imposed upon the states the requirement of enforcing federally-promulgated regulations, would contravene the tenth amendment and recommended that such an interpretation should be avoided when another is possible. *Friends of the Earth v. Carey*, 422 F. Supp. 638, 643-44 n.11 (S.D.N.Y. 1976).

¹²⁴ 29 U.S.C. § 203(d) (Supp. IV 1974) redefines employer to include any public agency. Public agency was also redefined to include any state or political subdivision thereof. *Id.* § 203(x).

¹²⁵ 96 S. Ct. at 2474.

¹²⁶ The New York case did not address this question of the breadth of the *National League of Cities* decision directly. Nevertheless, by implication, the court has failed to accept this broader interpretation, since it remains willing to allow enforcement actions to be instituted against the state as a polluter.

eral interest is demonstrably greater and where *state facility compliance* with imposed federal standards would be essential."¹²⁷

Literal statutory construction as well as present interpretation of the commerce clause indicate that Congress did not intend the federal government to institute civil or criminal enforcement proceedings against a state, except perhaps when the state is a polluter. Thus, it would appear that voluntary state cooperation is contemplated. The proposed conference bill permits a state governor to apply for a five-year extension of the deadline for attainment of primary standards in Air Quality Regions that will require transportation controls to meet those standards.¹²⁸ In the event a state fails to apply for an extension or the Administrator denies the extension request, the Administrator must propose and promulgate a plan that complies with the federal requirements. The conference bill further provides that the Administrator "may delegate the implementation or enforcement" of that plan to the state or local government.¹²⁹ To interpret this provision consistently with the theory of voluntary state cooperation would mean that the Administrator could only delegate the responsibility to a state which had demonstrated a willingness to assume the task.

It is unlikely that the interpretation of the Clean Air Act suggested by the Ninth, District of Columbia, and Fourth Circuits will result in widespread withdrawal of state involvement in air pollution control. As noted by the court in *Maryland v. EPA*, many forms of pressure have been upheld, including the withholding of federal funds, in order to induce the states to "voluntarily" comply with other federal legislation. Furthermore, the threat of rigorous federal enforcement may constitute a sufficient motive for the state to resume primary responsibility for pollution control. In effect, the state would probably prefer the expense of state enforcement to the doggedness of federal enforcement.¹³⁰

D. *Claims of Economic and Technological Infeasibility*

The new sulfur dioxide regulations for Ohio were published in the Federal Register in August 1976.¹³¹ Numerous petitions for judicial review of the Administrator's action have been filed in the Sixth Circuit Court of Appeals under section 307(b)(1).¹³² Until recently, a conflict existed among the various circuits regarding the relevant factors which could be considered in the review of agency action. In *Union Electric Co. v. EPA*,¹³³ the Supreme Court resolved one important aspect of this conflict. The Court ruled that the reviewing court may not consider

¹²⁷ 96 S. Ct. at 2476 (emphasis added). Justice Blackmun's reference to environmental protection may have been based on consideration of the circuit court cases discussed herein. Even so, his exception would appear to apply to the state as a polluter, not to the state as enforcer of the federal regulations.

¹²⁸ Conf. REP. No. 1742, 94th Cong., 2d Sess. § 124 (1976) (adding § 125).

¹²⁹ *Id.* § 124 (proposed § 125(g)(2)).

¹³⁰ 8 E.R.C. at 1114.

¹³¹ 41 Fed. Reg. 36,323 (1976).

¹³² See note 63 *supra*.

¹³³ 96 S. Ct. 2518 (1976).

industry claims that compliance with the state implementation plan is either economically or technologically impracticable. Prior to the Supreme Court's decision, the electric utilities had experienced varying degrees of success in asserting "impracticability claims" against compliance with state sulfur dioxide standards. Whether the outcome of *Union Electric* will preclude the assertion of such claims by challengers to the federal sulfur dioxide regulations in Ohio, however, remains uncertain.

1. *Compliance with Sulfur Dioxide Standards*

In recent years the sulfur dioxide standards have been subject to frequent attack. It is now questionable whether the real health hazard results from the presence of sulfur dioxide or from suspended sulfates in the atmosphere.¹³⁴ While the same sources are involved in either case, the reduction of suspended sulfate levels may necessitate tighter controls than those currently employed in sulfur dioxide regulation.

There are essentially three ways in which sulfur dioxide emissions can be controlled in order to meet present standards: (1) through the use of low sulfur fuels, particularly coal, found mainly in the western states and largely unavailable east of the Mississippi River; (2) coal washing and blending of high and low sulfur coals; and (3) flue gas desulfurization systems ("scrubbers"), which the EPA has found to be an available and reliable control method, but to which the electric utilities object on the grounds that the devices are costly and not yet technologically foolproof.

EPA has estimated that about thirty percent of the nation's coal-fired power plants will require scrubber installations by 1980.¹³⁵ Moreover, the EPA contends that the utilities have expended greater efforts in fighting the use of scrubbers than in seeking solutions to the problems which they allege to be inherent in these systems.¹³⁶ Both sides would agree that a major obstacle is cost. Although the EPA estimates an average nationwide consumer cost increase for electricity of approximately three percent,¹³⁷ those consumers within the service area of a utility company required to install scrubbers on a number of its boilers can expect an increase significantly above the national average.¹³⁸ The utilities have argued that it would be extremely difficult to pass these costs on to the consumer due to the slow process of receiving approval for rate increases from state utility commissions.¹³⁹ Further problems arise in obtaining the initial financing for such large capital

¹³⁴ See note 28 *supra*.

¹³⁵ REPORT OF THE HEARING PANEL, U.S. EPA, *National Public Hearings on Power Plant Compliance with Sulfur Oxide Air Pollution Regulations 2* (1974) [hereinafter cited as ARLINGTON HEARINGS REPORT].

¹³⁶ *Id.* at 4.

¹³⁷ *Id.* at 7.

¹³⁸ See, e.g., *Duquesne Light Co. v. EPA*, 522 F.2d 1186, 1190 (3d Cir. 1975) (expected increase to the consumer was estimated to be as high as 35 percent).

¹³⁹ *Id.* at 1195.

expenditures. There is also strong disagreement as to the technological feasibility of scrubbers. In its Arlington Hearings in January 1974, the EPA concluded that the reliability of scrubbers was sufficiently demonstrated to warrant widespread industry commitment;¹⁴⁰ In September of that same year, an Ohio Hearing Panel in an adjudicatory proceeding reached the opposite conclusion.¹⁴¹

2. *The Act and Its Legislative History*

Whether a reviewing court can consider impracticability claims when reviewing action by the Administrator depends upon whether the Administrator himself could evaluate such claims when he approved or disapproved the state plan, or when he promulgated portions of a plan for a state.¹⁴² In according great deference to the agency interpretation and in reviewing the Act's legislative history, the Supreme Court, in *Union Electric*, concluded that impracticability claims are "wholly foreign to the Administrator's consideration of a state implementation plan."¹⁴³ In particular, the Court found that the primary standards were intended by Congress to be of a "technology-forcing" nature, and, as such, "are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible."¹⁴⁴

The legislative history of the Clean Air Act unequivocally supports the view that claims of economic and technological hardship are irrelevant to attainment of the national primary ambient air quality standards. The final conference version of the Act closely followed the more restrictive Senate version of the bill.¹⁴⁵ The Senate Report emphasized that the deleterious effects of pollution on the public health made any consideration of economic and technological hardship irrelevant to attainment of the primary standard within the three-year deadline.¹⁴⁶ The

¹⁴⁰ ARLINGTON HEARINGS REPORT, *supra* note 135, at 9.

¹⁴¹ OHIO HEARING EXAMINER'S REPORT, *supra* note 32, at 169-70: "An analysis of this Record, as a whole, shows that reliable flue gas desulfurization technology which can be applied by the Ohio electric utilities to achieve compliance with pertinent regulations has not been demonstrated to a degree which would justify its installation."

¹⁴² *Union Elec. Co. v. EPA*, 96 S. Ct. 2518, 2525 (1976).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ H.R. CONF. REP. NO. 1783, 91st Cong., 2d Sess. 1 (1970), reprinted in U.S. CODE CONG. & ADMIN. NEWS 5374, 5389 (1970). For an excellent discussion of the legislative history of the Clean Air Act Amendments of 1970, see Bonine, *The Evolution of 'Technology-Forcing' in the Clean Air Act*, *Envir. Rep. (BNA)*, Monograph No. 21 (July 25, 1975); Note, *Clean Air Act Amendments of 1970: A Congressional Cosmetic*, 61 *Geo. L.J.* 153 (1972).

¹⁴⁶ S. REP. NO. 1196, 91st Cong., 2d Sess. 2-4 (1970):

In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and, 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health.

Conference Committee adopted the Senate's three-year deadline as opposed to the correspondent House provision which allowed for attainment of both the primary and secondary standards within a reasonable time period. The Conference Committee further strengthened the bill through its requirement that the national standard must be met "as expeditiously as practicable" but no later than three years from the date of approval of the state plan.¹⁴⁷ In the Senate Oversight Hearings in 1972, Senator Eagleton reiterated the technology-forcing nature of the 1970 amendments.¹⁴⁸

Moreover, section 110(a)(2) of the Clean Air Act supports the conclusion that impracticability claims are irrelevant to the Administrator's approval or disapproval of a state plan. That section enumerates eight criteria prerequisite to approval of a state implementation plan, further stating that the Administrator "shall" approve a plan which satisfies those requirements.¹⁴⁹ A finding that the plan is economically and technologically feasible is not one of the enumerated criteria. For state-submitted plans, additional support for ignoring impracticability is found in section 116, which permits states to enact more stringent regulations than necessary to achieve the national primary standard within three years.¹⁵⁰

3. *The Circuit Court Interpretations*

Despite the unequivocal legislative intent and the statutory language discussed above, there existed an irreconcilable split among the circuits concerning the relevance of impracticability claims to approval of a state plan. The Third Circuit had a sequence of four cases supporting the position that the Administrator must consider such claims.¹⁵¹ In

Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down.

This particular excerpt has been widely cited as support for the "technology-forcing" aspect of the Act. In particular, it was cited in *Union Elec. Co. v. EPA*, 96 S. Ct. at 2526, as authority for the Supreme Court's holding.

¹⁴⁷ 96 S. Ct. at 2526.

¹⁴⁸ *Hearings before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 2d Sess. (1972) [hereinafter cited as the *Senate Oversight Hearings of 1972*].

On this question of an economic factor, I am as positive about this as a mortal can be, that was specifically written out of the bill because many hours were spent in conference debating the economic feasibility factor and the house had such language in the bill as: "Giving due consideration to economic and technological feasibility of compliance."

That appeared in more than one place in the House bill and it was stricken from the bill in conference to go back to the Senate version which had no economic factor as far as protection of public health was concerned.

Id. at 21.

¹⁴⁹ See note 20 *supra*. See also 96 S. Ct. at 2525.

¹⁵⁰ 42 U.S.C. § 1857d-1 (1970). For a discussion of the effect of this provision upon federally promulgated regulations, see notes 66-75 *supra* and accompanying text. The interpretation of section 116 quoted in the text was confirmed by the Court in *Union Elec. Co. v. EPA*, 96 S. Ct. 2518 (1976).

¹⁵¹ *Duquesne Light Co. v. EPA* (Duquesne II), 522 F.2d 1186 (3d Cir. 1975), *vacated*, 96 S. Ct. 3185 (1976); *St. Joe Minerals Corp. v. EPA*, 508 F.2d 743 (3d Cir. 1975), *vacated*,

Getty Oil Co. v. Ruckelshaus,¹⁵² the plaintiffs sought to enjoin a federal compliance order issued against them pursuant to section 113. The plaintiffs had not filed a petition for review of the Administrator's approval of the Delaware plan under section 307(b)(1); instead they applied for a variance by the state agency which would insure a temporary reprieve from state enforcement. While their application for a variance was being considered, Getty attempted to restrain federal enforcement by claiming that the primary sulfur dioxide standards had been met in its region and that the federal compliance order was, therefore, unnecessary. Plaintiffs also contended that the emission limitation would subject them to unreasonable economic hardship.

The court denied plaintiffs' request for relief, holding that such allegations constituted a direct challenge to the "necessity, reasonableness and constitutionality"¹⁵³ of the regulations in the state plan and, as such, were reviewable only in a section 307(b)(1) challenge. The court thus explicitly assumed that plaintiffs "could have raised the question of economic hardship or lack of compelling necessity" in a section 307(b)(1) hearing.¹⁵⁴ The "*Getty Oil* dilemma" is attributable to that assumption, since section 307(b)(2) precludes review of any agency action in a federal enforcement proceeding if that action is reviewable under section 307(b)(1).¹⁵⁵ Because plaintiffs had failed to seek section 307(b)(1) review within thirty days after the Administrator approved the state plan, they were foreclosed from further judicial examination of that approval.¹⁵⁶

In subsequent cases, the Third Circuit expanded the unsupported assumption made in *Getty Oil*. In *Duquesne Light Co. v. EPA (Duquesne I)*,¹⁵⁷ the Administrator was instructed either to stay enforcement until state appeals were completed or to conduct a limited legislative hearing on the questions of economic and technological feasibility.¹⁵⁸ On remand to the agency, the Administrator chose to conduct a hearing and found compliance to be both economically and technologically feasible for all petitioners except St. Joe Minerals.¹⁵⁹ In so doing the Administrator relied on the special report published by EPA based on the public hearings in Arlington, Virginia, which analyzed nationwide progress towards compliance with sulfur dioxide standards.¹⁶⁰

Separate appeals were filed by Duquesne Light Company and St.

96 S. Ct. 2196 (1976); *Duquesne Light Co. v. EPA (Duquesne I)*, 481 F.2d 1 (3d Cir. 1973); *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

¹⁵² 467 F.2d 349 (3d Cir. 1972).

¹⁵³ *Id.* at 357 n.14.

¹⁵⁴ *Id.* at 357.

¹⁵⁵ Section 307(b)(2), 42 U.S.C. § 1857h-5(b)(2) (1970) provides: "Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

¹⁵⁶ 467 F.2d at 357-58 n.14.

¹⁵⁷ 481 F.2d 1 (3d Cir. 1973).

¹⁵⁸ *Id.* at 10.

¹⁵⁹ *Duquesne Light Co. v. EPA (Duquesne II)*, 522 F.2d 1186, 1191 (3d Cir. 1975).

¹⁶⁰ ARLINGTON HEARINGS REPORT, *see* note 135 *supra*.

Joe Minerals Corporation. The court of appeals in its second opinion entitled *Duquesne Light Co. v. EPA (Duquesne II)*, reversed the Administrator's findings on remand as "arbitrary and capricious [and] an abuse of discretion."¹⁶¹ In *St. Joe Minerals Corp. v. EPA*, the court found that the judicial authority to reject a state plan on the basis of economic or technological infeasibility was implicit in its remand to the agency in *Duquesne I*. In reaching this conclusion, the Third Circuit reasoned that "an essential underpinning" of its decision in *Getty Oil* was that the court could have considered these factors in a section 307(b)(1) challenge. Thus, in *St. Joe Minerals Corp.* the court found that "[i]f a court of appeals is empowered to review, and presumably reverse, the Administrator's approval on technological and economic grounds, then surely the Administrator has the authority to review the plan on those same grounds and disapprove the plan, or a portion of it, if he finds it unreasonable."¹⁶² The problem with this reasoning is that the scope of judicial review does not determine the nature of the agency's responsibilities.¹⁶³ To the contrary, if the Administrator is not permitted to consider such claims, then their introduction by petitioners in a suit for review of the Administrator's decision is legally irrelevant.¹⁶⁴

In addition to the Third Circuit, the Fourth and Sixth Circuits held that economic and technological considerations were "relevant factors" to the Administrator's review of a state's plan.¹⁶⁵ The Fourth Circuit adopted the *Getty Oil* position finding it to be supported by the scope of judicial review of administrative actions as set forth in the Supreme Court case of *Citizens to Preserve Overton Park, Inc. v. Volpe*.¹⁶⁶

¹⁶¹ 522 F.2d at 1196.

¹⁶² 508 F.2d at 747.

¹⁶³ For an attack on the logic of the court's statement, see Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources*, 89 HARV. L. REV. 316, 347 (1975). The Supreme Court is in agreement. *Union Elec. Co. v. EPA*, 96 S. Ct. 2518, 2524 (1976).

¹⁶⁴ *Senate Oversight Hearings of 1972*, *supra* note 148.

As a lawyer, if this is being tried in a court of law under theories of the admissibility of evidence, if economic factors are not in the bill and are not to be considered as part of the criteria or standards, I think that evidence would be thrown out as being irrelevant. It is of no moment to the attainment of the 1975 public health standard.

Id. at 24 (remarks of Senator Eagleton).

¹⁶⁵ *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973); *Appalachian Power Co. v. EPA*, 477 F.2d 495 (4th Cir. 1973).

¹⁶⁶ 477 F.2d at 505. The standard of review set by the Supreme Court requires that the courts, pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1970), make a finding that:

[T]he actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." . . . To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (emphasis added).

The conflict revolved around the definition of "relevant factors." While some courts held that the Administrator must consider "all relevant factors," see, e.g., *Appalachian Power v. EPA*, 477 F.2d 495, 505 (4th Cir. 1973), others sought to determine which

Furthermore, the Fourth Circuit found it "inconceivable" that the Administrator did not evaluate these relevant factors in determining whether the plan was reasonably likely to achieve its intended results.¹⁶⁷ The Sixth Circuit in *Buckeye Power, Inc. v. EPA* deemed these factors relevant but, in so doing, erroneously relied on the House Report¹⁶⁸ and on the guidelines issued to the states which urged them to consider such factors in drafting their implementation plans.¹⁶⁹

The five other circuits¹⁷⁰ which considered this issue and reached the opposite result emphasized the fact that the language of section 110 (a)(2) omits mention of economic and technological considerations from the list of criteria specified for the Administrator's use in reviewing state implementation plans.¹⁷¹ These decisions also focused on the technology-forcing character of the Clean Air Act. For example, the First Circuit found that Congress had made a legislative judgment that considerations affecting the public health took priority over any economic considerations raised by industry.¹⁷² The Seventh Circuit construed the three-year deadline set by Congress for attainment of the primary standard as the point beyond which impracticability claims were irrelevant.¹⁷³

factors were relevant based upon the statutory language and the legislative history. See, e.g., *Union Elec. Co. v. EPA*, 515 F.2d 206, 214 (8th Cir. 1975), *aff'd*, 96 S. Ct. 2518 (1976).

¹⁶⁷ 477 F.2d at 506-07. The court then ordered the Administrator to certify to the court the record upon which he had acted.

¹⁶⁸ 481 F.2d at 168-69. The court's confusion may be traced to the fact that the Act carried the House bill number. See 3 U.S. CODE CONG. & ADMIN. NEWS, 91st Cong., 2d Sess. 5356 (1970). See note 196 *infra* for a discussion of the holding. Criticism of this case has been strong. Bonine, *The Evolution of 'Technology-Forcing' in the Clean Air Act*, Envir. Rep. (BNA), Monograph No. 21 at 22 n.329 (July 25, 1975); Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources*, 89 HARV. L. REV. 316, 337-38 (1975).

¹⁶⁹ 40 C.F.R. § 51.2 (1972). These guidelines were criticized by Richard Ayres during the 1972 *Senate Oversight Hearings*. Ayres told the Committee that the guidelines were being construed by the courts to require that the federal Administrator consider these factors when approving the state plan. Senator Eagleton contended that the guidelines were consistent with the congressional intent that such matters be handled at the local level, and did not support the court's position in *Buckeye Power*. *Senate Oversight Hearings of 1972*, *supra* note 148, at 24.

¹⁷⁰ *Union Elec. Co. v. EPA*, 515 F.2d 206 (8th Cir. 1975); *Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839 (7th Cir. 1975); *Natural Resources Defense Council, Inc. v. EPA*, 507 F.2d 905 (9th Cir. 1974); *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974); *Texas v. EPA*, 499 F.2d 289 (5th Cir. 1974).

¹⁷¹ See, e.g., *Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839, 844 (7th Cir. 1975): "Furthermore, in view of the numerous criteria which section 110(a)(2) specifies for the Administrator's consideration prior to approval of a state plan, we find the absence of any reference to economic or technological factors highly significant." The legislative history was heavily relied upon to support the court's interpretation of this congressional omission.

¹⁷² *South Terminal Corp. v. EPA*, 504 F.2d 646, 675 (1st Cir. 1974):

Thus, insofar as petitioners claim that either EPA or ourselves would be empowered to reject measures necessary to ensure compliance with primary air quality standards simply because after weighing the advantages of safe air against the economic detriment, we thought the latter consideration took priority, petitioners would be incorrect. Congress has already made a judgment the other way, and EPA and the courts are bound.

¹⁷³ *Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839, 844 (7th Cir. 1975). The Supreme

Court has apparently adopted this view:

The facts in the Eighth Circuit case of *Union Electric Co. v. EPA*¹⁷⁴ were very similar to those in the 1973 *Getty Oil* decision. It was the only case which had arisen since *Getty Oil* where the petitioners had not filed a section 307(b)(1) challenge for review of the state implementation plan within thirty days of the Administrator's approval. Instead, they had originally sought a state variance, but while awaiting a decision from the state they were notified by the Administrator of violations of the sulfur dioxide regulations. In order to avoid federal enforcement and the dilemma faced by the *Getty Oil* plaintiffs,¹⁷⁵ petitioners sought jurisdiction through a provision in section 307 which extended review beyond the thirty day period for grounds arising subsequent to the expiration of that period. Union Electric claimed that the following grounds arose after the statutory 30-day period: (1) shortages of low sulfur coal — allegedly attributable to the Arab oil embargo; (2) technological infeasibility of scrubbers; (3) exorbitant costs of scrubbers; (4) difficulty in obtaining financing; (5) evidence challenging the existence of a need for sulfur dioxide standards to protect the public health; and (6) the contention that compliance was unnecessary to attain the primary standard.¹⁷⁶ Rather than finding that these grounds actually arose subsequent to expiration of the 30-day period, the court chose to assume this as a fact for purposes of determining jurisdiction. The court then considered the scope of review under section 307 and concluded that, even if these grounds arose after the 30-day period, they would not be relevant to the Administrator's approval of the state plan.¹⁷⁷ After examining the applicable legislative history and the other circuit court decisions, the Eighth Circuit concluded that economic and technological considerations were not subject to section 307(b)(1) judicial review, but rather were, more appropriately, legislative judgments.¹⁷⁸ The Eighth Circuit's decision was appealed to the Supreme Court.

4. *The Supreme Court's Decision and Questions Remaining*

On appeal to the Supreme Court, Union Electric argued that there was a stronger reason for judicial review of economic and technological claims which arose subsequent to the Administrator's initial approval of the state plan.¹⁷⁹ The Supreme Court rejected this argument, stating that the new grounds must be ones which, had they existed at the time of approval of the state plan, the Administrator would have had to con-

Whatever room there is for considering claims of infeasibility in the attainment of primary standards must lie in the phrase, ["as expeditiously as practicable but . . . in no case later than three years . . ."] which is, of course, relevant only in evaluating those implementation plans that attempt to achieve the primary standard in less than three years.

96 S. Ct. 2518, 2526 (1976).

¹⁷⁴ 515 F.2d 286 (8th Cir. 1975).

¹⁷⁵ See notes 152-56 *supra* and accompanying text.

¹⁷⁶ *Union Elec. Co. v. EPA*, 515 F.2d 206, 210 n.8 (8th Cir. 1975).

¹⁷⁷ *Id.* at 214.

¹⁷⁸ *Id.* at 219.

¹⁷⁹ *Union Elec. Co. v. EPA*, Brief for Petitioner at 13.

sider.¹⁸⁰ The Court analyzed the statute and found that it was "apparent on the face of § 110(a)(2)" that the Administrator should consider only the factors enumerated by statute and, moreover, that he must approve every plan which meets those requirements.¹⁸¹ In addition, the Court noted that the three-year deadline "leaves no room for claims of technological or economic infeasibility."¹⁸² Construing section 110 (a)(2) in conjunction with section 116, the Court held that "the States may adopt emission standards stricter than the national standards."¹⁸³ This analysis led the Court to the same conclusion reached by the Eighth Circuit: the Administrator had no authority to reject a state plan on the grounds that it was economically or technologically impracticable; and, therefore, a court reviewing the Administrator's action could not set aside a plan on those grounds.

As previously discussed, when the Administrator disapproves a portion of a state plan or a state fails to submit a portion of its plan, the Administrator must promulgate regulations for the state pursuant to section 110(c).¹⁸⁴ The question posed in such situations is whether the Administrator must consider claims of impracticability when he develops regulations for the state. The Supreme Court has yet to resolve this question.¹⁸⁵ The federal-state structure of the Clean Air Act afforded the states the opportunity to make policy decisions regarding the "mix of emission limitations," and the states were invited to consider impracticability claims by industries within the state when devising their implementation plans.¹⁸⁶ The state was free to adopt regulations more stringent than necessary to satisfy the primary standards. In so doing, the states could further impose a "technology-forcing" three-year deadline for compliance with the secondary air quality standards. As long as the federal minimum was assured, the Administrator was required to approve the state plan.¹⁸⁷ While it seems settled that the Administrator has authority to promulgate only those regulations necessary for a state to meet the national standard, it remains an open question whether the Administrator must consider cost and availability of technology in developing such regulations.

The fact that the federal agency conducted hearings, received written comments from interested parties throughout Ohio, and spent eight months incorporating those comments into final regulations, suggests that impracticability claims have been duly considered by the agency. Rather than inviting a challenge on those grounds, the agency has adopted the safest route by considering industry's claims to the extent possible and by adopting a mix of emission limitations only as

¹⁸⁰ 96 S. Ct. 2518, 2524 (1976).

¹⁸¹ *Id.* at 2525.

¹⁸² *Id.* at 2526.

¹⁸³ *Id.* at 2528. See notes 68-70 *supra* and accompanying text.

¹⁸⁴ See note 57 *supra*.

¹⁸⁵ 96 S. Ct. at 2527 n.7.

¹⁸⁶ See note 24 *supra* and accompanying text. See also 40 C.F.R. § 51.2 (1972).

¹⁸⁷ 96 S. Ct. at 2526-29.

stringent as is necessary to meet the primary national ambient air quality standard within three years.

5. *When Claims of Impracticability Can Be Raised*

It should be recalled that the scope of judicial review under sections 307(b)(1) and 307(b)(2) are mutually exclusive.¹⁸⁸ Section 307(b)(2) provides that: "Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."¹⁸⁹ Thus, the decision made with regard to the scope of review under section 307(b)(1) will predetermine, to some extent, the kinds of defenses which may be raised in federal enforcement proceedings under section 113. Because the *Getty Oil* court determined that economic and technological claims could have been raised in a section 307(b)(1) challenge, petitioners were foreclosed from raising those claims in federal enforcement proceedings.¹⁹⁰ The converse, however, is not necessarily true. Those circuits which have determined that economic and technological hardship is not reviewable in a section 307(b)(1) challenge to the Administrator's approval of a state plan are not in agreement that such claims could be raised in enforcement proceedings.¹⁹¹

*Indiana & Michigan Electric Co. v. EPA*¹⁹² brought to light a point raised earlier by the Sixth Circuit in *Buckeye Power, Inc. v. EPA*.¹⁹³ As discussed previously,¹⁹⁴ the Sixth Circuit found that under the Administrative Procedure Act, the Administrator was required to conduct hearings at the federal level prior to approval of a state's plan to afford opportunities for public participation in the decision-making process. That court also considered section 703 of the A.P.A. which provides: "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."¹⁹⁵ The Sixth Circuit ruled that there had not been an adequate hearing at the federal level on the individual claims presented and, therefore, that those claims could be raised as a defense in subsequent federal enforcement proceedings.¹⁹⁶

¹⁸⁸ See discussion of *Getty Oil* at notes 152-56 *supra* and accompanying text.

¹⁸⁹ 42 U.S.C. § 1857h-5(b)(2) (1970).

¹⁹⁰ 467 F.2d at 357-58 n.14. *Accord*, *Duquesne Light Co. v. EPA*, 522 F.2d 1186, 1189 (3d Cir. 1975); *Appalachian Power, Co. v. EPA*, 477 F.2d 495, 499 (4th Cir. 1973). *Cf.* *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 173 (6th Cir. 1973).

¹⁹¹ *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 173 (6th Cir. 1973). *Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839, 845 (7th Cir. 1975), held that such claims could be raised in enforcement proceedings. *Union Elec. Co. v. EPA*, 515 F.2d 206 (8th Cir. 1975), by implication, ruled that such claims could never be raised, since they were political questions.

¹⁹² 509 F.2d 839 (7th Cir. 1975).

¹⁹³ 481 F.2d 162 (6th Cir. 1973).

¹⁹⁴ See notes 40-42 *supra* and accompanying text.

¹⁹⁵ 5 U.S.C. § 703 (1970).

¹⁹⁶ 481 F.2d at 173. There seems to be some confusion over the holding of the Sixth Circuit in *Buckeye Power*. For instance, the court in *Union Elec. Co. v. EPA*, 515 F.2d

The Seventh Circuit agreed that such claims could be raised in enforcement proceedings because their decision precluded review of these claims under section 307(b)(1). They further asserted that such claims were far more appropriate for judicial review on an individual basis since review under section 307(b)(1) would require rejection of an entire state plan if any person could demonstrate infeasibility as the emission limitations of the plan applied to him.¹⁹⁷

The Eighth Circuit discussed with disfavor the *Buckeye Power* decision, but failed to specifically hold that infeasibility claims could not be raised in enforcement proceedings.¹⁹⁸ They did, however, maintain that such claims are "essentially legislative judgments as to where the public interest lies" and would be decided in the legislative arena if the situation became serious enough.¹⁹⁹ In argument before the Supreme Court, the Administrator took the position that he must consider claims of economic or technological impracticability in determining the appropriateness of an enforcement order under section 113(a)(4).²⁰⁰ Section 113(a)(4) requires the Administrator to set up a compliance

206, 217 (8th Cir. 1975), noted that the *Buckeye* court held "review of petitioner's claims of economic and technological infeasibility of compliance could not be obtained in a § 307(b)(1) review proceeding." In contrast, the Bleicher article, note 168 *supra*, at 340, states that "*Buckeye Power* thus requires the Administrator to consider feasibility factors in legislative hearings prior to SIP approval (an action subject to judicial review under section 307)."

The *Buckeye* court found that hearings at the state level were inadequate to protect petitioners from federal enforcement actions. Therefore, the *Buckeye* court ordered the Administrator to comply with section 553 of the Administrative Procedure Act, which mandates that the agency entertain comments from interested parties before deciding whether to approve a state plan. 481 F.2d at 170-71. Such action would appear to be reviewable under section 307(b)(1), 42 U.S.C. § 1857h-5(b)(1) (1970). Later in the opinion, however, the court asserted that they had found review of petitioners' claims could not have been obtained under section 307(b)(1) and that, therefore, the claims could be raised as a defense in subsequent enforcement proceedings. *Id.* at 173. While sections 307(b)(1) and (2) are on their face mutually exclusive, it would appear that the Sixth Circuit provided for review of infeasibility claims under both sections. The *Union Electric* interpretation of *Buckeye* was not entirely incorrect, however, since the *Buckeye* court stated that they found review under section 307(b)(1) could not be obtained. The only plausible interpretation of *Buckeye* is that the court was requiring the Administrator to conduct legislative hearings for presentation of economic and technological claims but deeming such factors as non-reviewable in a section 307(b)(1) hearing.

This inconsistency does not necessarily detract from the *Buckeye* court's reliance on section 703 of the Administrative Procedure Act. Since it has now been determined that infeasibility claims can not be raised in a section 307(b)(1) challenge to the Administrator's approval of a state plan, section 307(b)(2) affords a possible forum for such claims. See *Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839, 845 (7th Cir. 1975).

¹⁹⁷ 509 F.2d at 845:

To hold that approval or adoption of a state's plan is "unreasonable" or "capricious" on the basis of its application to a particular facility or company would undermine the purpose and intent of the legislation under consideration, and would require rejection of a state's plan if any person arguably subject to the plan could demonstrate its inability to adapt to the emission limitations set forth therein. No fair reading of the Clean Air Act supports such a proposition.

¹⁹⁸ *Union Elec. Co. v. EPA*, 515 F.2d 206, 217 (8th Cir. 1975).

¹⁹⁹ *Id.* at 219. In support of this view, see Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources*, 89 HARV. L. REV. 316, 323-25 (1975).

²⁰⁰ *Union Elec. Co. v. EPA*, Respondent's Brief at 36 n.34.

schedule that he determines is "reasonable, taking into account the seriousness of the violation and any good faith efforts to comply."²⁰¹

The Supreme Court agreed with the Administrator's view that claims of economic or technological feasibility "are relevant to fashioning an appropriate compliance order under § 113(a)(4)."²⁰² The Court also noted other occasions where such claims could be raised most important of which was the opportunity to submit comments during the state hearings before adoption of the state plans. Applications for variances and review in state courts for denial of same were other forums mentioned by the Court. Thus, the Court found that the Act provided "ample opportunity" to raise such claims without interfering with attainment of the national standards.²⁰³

The Supreme Court did not consider whether those claims could be raised in other proceedings under section 113.²⁰⁴ For example, if the Administrator decides against issuance of a compliance order, he may file civil suit for injunctive relief or seek criminal penalties. Whether infeasibility may be raised as a defense under those circumstances was not addressed,²⁰⁵ nor was the even more perplexing question whether those claims could be raised as defenses to citizen enforcement suits brought under section 304.²⁰⁶

In cryptic terms, the Court suggested that, at some stage, due process may require an opportunity for judicial review of a claim of impracticability.²⁰⁷ Since those claims cannot be raised in a section 307(b)(1) challenge to the plan, the Sixth and Seventh Circuits may be correct in referring to section 703 of the Administrative Procedure Act and in holding that impracticability claims can be raised in any civil or criminal enforcement proceeding. This result, although contrary to congressional intent, may be required to justify the imposition of tremendous financial burdens on individual polluters. On the other hand, the taking of property without due process may be narrowly construed to avoid an interpretation contrary to congressional intent. The First Circuit in *South Terminal Corp. v. EPA*, noted that the regulations challenged in that case, which restricted the use of property, did not constitute a taking.²⁰⁸ A continuation of the Court's pattern of strict statutory construction of the Clean Air Act would signify adherence to the principle that these pollutant sources must either "meet the standard of the law or be closed down."²⁰⁹ The concurring opinion in *Union Electric* advocated some balancing of the equities in situations where a plant may be closed down. They posed the question whether it would be in the best interest of the

²⁰¹ 42 U.S.C. § 1857c-8(a)(4) (1970).

²⁰² 96 S. Ct. at 2530.

²⁰³ *Id.*

²⁰⁴ *Id.* n.18.

²⁰⁵ *Id.*

²⁰⁶ 42 U.S.C. § 1857h-2 (1970).

²⁰⁷ 96 S. Ct. at 2531 n.19. The Court declined to grant certiorari on the question as the claim was neither presented to, nor considered by, the court of appeals.

²⁰⁸ 504 F.2d 654, 678-79 (1st Cir. 1974).

²⁰⁹ See note 25 *supra* and accompanying text.

public health to close down an electric utility for noncompliance with pollution standards.²¹⁰ However, the concurring justices left this decision to Congress stating that if such a devastating consequence were likely to occur, Congress "would strike a different balance."²¹¹

IV. A REPEAT PERFORMANCE BY THE SIXTH CIRCUIT?

As previously noted,²¹² section 307(b)(1) challenges to the federal sulfur dioxide regulations have been filed in the Sixth Circuit Court of Appeals. In response to a request by petitioners for a stay of enforcement, the court has issued an order based on administrative due process grounds. This court action is reminiscent of its earlier decision in *Buckeye Power, Inc. v. EPA*.²¹³ The stay was issued to enable the federal EPA to receive further comments from interested parties concerning the final sulfur dioxide regulations.

Extensive hearings were held when the regulations were proposed and revisions were made before final promulgation in order to accommodate suggestions made at those public hearings.²¹⁴ While section 110(c) requires the Administrator to conduct hearings within a state "on any proposed regulation," there appears to be no statutory provisions requiring additional hearings or a written comment period once final promulgation has occurred.²¹⁵ Additionally, the Administrative Procedure Act,²¹⁶ as interpreted by the courts,²¹⁷ does not require a new public comment period when changes are made in response to suggestions of interested parties. The District of Columbia Circuit, in an opinion by Judge Leventhal, noted that: "The requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions."²¹⁸ That court was cautious, however, in limiting the holding to the facts at hand, stating that under the circumstances the lack of a right to a hearing was neither a violation of the Administrative Procedure Act nor of due process.²¹⁹ In dictum, the court noted that even if a petition for reconsideration or modification were granted, "those petitions could not have affected or deferred the finality of the EPA decision."²²⁰ If Judge Leventhal's conclusions are correct, the Sixth Circuit

²¹⁰ 96 S. Ct. at 2532 (Powell, J., concurring).

²¹¹ *Id.*

²¹² See note 63 *supra* and accompanying text.

²¹³ 481 F.2d 162 (6th Cir. 1973). See also note 42 *supra*.

²¹⁴ See note 61 *supra* and accompanying text.

²¹⁵ 42 U.S.C. § 1857c-5(c) (1970) (emphasis added).

²¹⁶ Specifically, 5 U.S.C. § 553(b)(3) (1970).

²¹⁷ *Ethyl Corp. v. EPA*, 541 F.2d 1, 48-49 (D.C. Cir. 1976) and cases cited therein. See also *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974) ("Parties have no right to insist that a rule remain frozen in its vestigial form."); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

²¹⁸ *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973).

²¹⁹ *Id.* See also *Ethyl Corp. v. EPA*, 541 F.2d 1, 48-49 (D.C. Cir. 1976).

²²⁰ *Id.*

has erred in granting a stay of enforcement to appellants even if its finding of a violation of administrative due process is meritorious.

The petitioners are expected to challenge the federal sulfur dioxide regulations on the ground that they are more stringent than necessary to bring the state's air quality within the national primary standard. Such a challenge will result in a highly technical battle of experts to determine the accuracy of the computer models used by the federal agency. The federal EPA has spent more than two years developing these regulations. Great care was taken to insure that the regulations could withstand a section 307 challenge.²²¹ In view of the complexity of its task and the inherent difficulties with computer modeling, this would seem to be an appropriate case for judicial deference to agency expertise.²²²

Another issue which may arise in the Sixth Circuit concerns the Administrator's duty to consider impracticability claims when he develops regulations for a state. This issue is theoretically based upon the fact that the states are urged to consider such claims when they devise their own implementation plans.²²³ Two things militate against a successful challenge to the regulations on the grounds of impracticability. First, there is no statutory requirement that the states take such factors into consideration. Nevertheless, the federal EPA allowed interested parties to raise such claims at the public hearings when the regulations were proposed and made adjustments where possible to accommodate valid criticisms before final promulgation. Secondly, if as the EPA contends, its regulations are only as stringent as necessary to meet the national primary standard, then claims of impracticability are irrelevant. The two most recent Supreme Court decisions, *Train v. Natural Resources Defense Council, Inc.*²²⁴ and *Union Electric Co. v. EPA*,²²⁵ have emphasized the importance of the national standards. In *Union Electric*, the Court found that prompt attainment of the national standards was the primary goal of the 1970 Act. The Court refused to render Congress' technology-forcing policy a nullity by permitting consideration of claims of technological and economic feasibility.²²⁶

The possibility that the Sixth Circuit will once again invalidate Ohio's sulfur dioxide regulations motivates a consideration of whether the legislative intent of the Clean Air Act Amendments of 1970 would thereby have been thwarted by industry and the courts. In this regard, it is interesting to note that the proposed congressional amendments to the

²²¹ See note 62 *supra*.

²²² See notes 76-82 *supra* and accompanying text.

²²³ See *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975). See also 40 C.F.R. § 51.2 (1972).

²²⁴ 421 U.S. 60 (1975).

²²⁵ 96 S. Ct. 2518 (1976).

²²⁶ *Id.* at 2531:

Technology forcing is a concept somewhat new to our national experience and it necessarily entails certain risks. But Congress considered those risks in passing the 1970 Amendments and decided that the dangers posed by uncontrolled air pollution made them worth taking. Petitioner's theory would render that considered legislative judgment a nullity, and that is a result we refuse to reach.

Clean Air Act have retained and strengthened their original technology-forcing character despite industry resistance.

V. 1976-77 AMENDMENTS

The Senate Public Works Committee and the House of Representatives Committee on Interstate and Foreign Commerce authored two separate bills to amend the Clean Air Act.²²⁷ Both bills passed their respective bodies during the second session of the ninety-fourth Congress. A Conference version also emerged,²²⁸ but no final action was taken during that session. A number of the changes may affect the future of stationary source compliance including amendments relating to state implementation plans, significant deterioration, and federal enforcement. These changes will be surveyed.

A. State Implementation Plans

The Conference Bill requires each state to submit to the Administrator, within 120 days from enactment, a list of the state's air quality control regions and the current status of air quality for each regulated pollutant within those regions.²²⁹ Sulfur oxides and particulate matter are treated separately from mobile-source related pollutants. The state must identify those regions that are not in compliance with the primary standard for each pollutant; and additionally, those regions that are not in compliance with any secondary standard.²³⁰ The Administrator has authority to modify a state's list so long as he gives the state notice and an opportunity to show why such modification would be improper.

The information supplied by the states will be used to implement the controversial significant deterioration policy²³¹ and will aid in the development of the transportation control plans necessary to attainment of the primary standards for pollutants such as carbon monoxide, nitrogen oxides, hydrocarbons, and photochemical oxidants.²³² Two new sub-

²²⁷ S. 3219, 94th Cong., 2d Sess. (1976); H.R. 10498, 94th Cong., 2d Sess. (1976).

²²⁸ CONF. REP. NO. 1742, 94th Cong., 2d Sess. (1976).

²²⁹ *Id.* § 103 (amending § 107 of the Clean Air Act Amendments of 1970, 42 U.S.C. § 1857c-2 (1970)).

²³⁰ Specifically, each state must designate the air quality control regions which:

(A) do not meet a national primary ambient air quality standard for any air pollutant other than sulfur oxides or particulate matter;

(B) do not meet, or in the judgment of the State may not in the time period required by an applicable implementation plan attain or maintain any national primary ambient air quality standard for sulfur oxides or particulate matter;

(C) do not meet a national secondary ambient air quality standard for any pollutant;

(D) cannot be classified under subparagraph (B) or (C) of this paragraph on the basis of available information, for ambient air quality levels for sulfur oxides or particulate matter; or

(E) cannot be classified under subparagraph (A) or (C) of this paragraph on the basis of available information, for ambient air quality levels for any air pollutant other than sulfur oxides or particulate matter.

Id. § 103 (proposed § 107(d)(1)(A)-(E), 42 U.S.C. § 1857c-2(d)(1)(A)-(E)).

²³¹ See notes 235-60 *infra* and accompanying text.

²³² A detailed discussion of transportation-related amendments is beyond the scope

sections under section 110(a)(2) will incorporate the significant deterioration policy²³³ and the transportation control plans²³⁴ into the individual state implementation plans.

B. Significant Deterioration

Some background is necessary for an adequate understanding of the amendment that incorporates a policy of no significant deterioration of air quality into each state implementation plan.²³⁵ In the 1972 district court decision of *Sierra Club v. Ruckelshaus*,²³⁶ the Administrator's approval of state plans which failed to provide against degradation of clean air areas was successfully challenged. The court relied on the 1970 Act's predecessor wherein the terms "protect and enhance" were first incorporated into the Act's statement of purpose. The court also relied on HEW regulations employing the words "significant deterioration" to implement the Act's purpose of protection and enhancement. Reliance was also placed on a statement contained in the legislative history of the 1970 amendments:

In areas where current air pollution levels are already equal to or better than the air quality goals, [the primary and secondary standards] the Secretary shall not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality.²³⁷

The district court's injunction was affirmed by an equally divided Supreme Court.²³⁸ In order to comply with the injunction the EPA published regulations for the prevention of significant deterioration of air quality in areas where the air pollution levels were already below the national standards.²³⁹ Nevertheless, there has remained a great deal of confusion about the policy of nondegradation not the least of which was generated by the less than "definitive" Supreme Court af-

of this Note; however, a brief reference may be found in text accompanying notes 128-29 *supra*.

²³³ CONF. REP. NO. 1742, 94th Cong., 2d Sess. § 123(c)(1) (1976) (amending § 110(a)(2), 42 U.S.C. § 1857c-5(a)(2) (1970)). This provision incorporates into the criteria listed in section 110(a)(2) a requirement of compliance with the policy of "prevention of significant deterioration of air quality." *Id.* See also *id.* § 123(a) (adding § 160(c)(1)).

²³⁴ *Id.* § 124(b) (amending § 110, 42 U.S.C. § 1857c-5 (1970)).

²³⁵ See generally Note, *Review of EPA's Significant Deterioration Regulations: An Example of the Difficulties of the Agency-Court Partnership in Environmental Law*, 61 VA. L. REV. 1115 (1975); Comment, *Sierra Club v. Ruckelshaus—On a Clear Day*, 4 ECOLOGY L.Q. 739 (1975).

²³⁶ 344 F. Supp. 253 (D.D.C.), *aff'd per curiam*, 4 E.R.C. 1815 (D.C. Cir. 1972), *aff'd sub nom. by an equally divided Court*, *Fri v. Sierra Club*, 412 U.S. 541 (1973).

²³⁷ 344 F. Supp. at 255 (quoting S. Rep. No. 1196, 91st Cong., 2d Sess., at 2 (1970)). One commentator has noted that the court actually misquoted the Senate Report which reads "the Secretary *should* not approve" any plan which does not prevent significant deterioration of air quality in clean areas. Bolbach, *The Courts and the Clean Air Act*, ENVIR. REP. (BNA), Monograph No. 19 at 22 (July 12, 1974).

²³⁸ *Fri v. Sierra Club*, 412 U.S. 541 (1973).

²³⁹ 40 C.F.R. § 52.21 (1972).

firmance of a cursory district court opinion.²⁴⁰ The definition of what is *significant* deterioration has been uncertain; the natural limits appear to be zero deterioration at one end and the secondary standards at the other. The 1976-77 amendments would clarify the policy and, above all, signify its reaffirmance by Congress. As was discussed earlier,²⁴¹ such a policy is necessary in order to prevent the dispersion of polluters into outlying areas thus, in time, creating a situation in which the air is uniformly dirty at a level just below the national secondary standards.

The regulations issued in response to the *Sierra Club* decision were unsatisfactory. The guidelines provided for the division of air quality control regions into three categories.²⁴² Initially all areas were designated class II with redesignation to be accomplished by the states subject to approval by the Administrator. In redesignating areas, the states were to consider future growth patterns and social, environmental, and economic impact.

Maximum allowable increases in pollution levels were assigned to each class. Class I areas were the most restrictive with incremental increases in pollution levels for sulfur oxides and particulates severely limited. Class II areas permitted a greater increase, and class III areas were limited only by the national standards. There was no requirement, however, that any area be designated as class I and, likewise, there was no precaution against the designation of large numbers of regions as class III. This left wide discretion with the individual state subject only to the requirement of federal approval. The Administrator could disapprove only those state classification plans that arbitrarily disregarded relevant considerations. The wide discretion thus left to the states has been a strongly criticized weakness of the EPA regulations.²⁴³

The Conference Bill proposes to amend Title I of the Clean Air Act to include a special section dealing with nondegradation.²⁴⁴ The pro-

²⁴⁰ The EPA's original regulations, issued in 1973, were prefaced by the statement that: "In EPA's view, there has been no definitive judicial resolution of the issue whether the Clean Air Act requires prevention of significant deterioration of air quality." 38 Fed. Reg. 18,985 (1973). The fact that the district court's opinion was only a short memorandum opinion issued pursuant to a request for a preliminary injunction, plus the fact that it was affirmed by a four-four vote in the Supreme Court has caused considerable uncertainty. The District of Columbia Court of Appeals has reaffirmed their earlier position in a recent case, *Sierra Club v. EPA*, 540 F.2d 1114 (D.C. Cir. 1976). The opinion, written by Judge J. Skelly Wright, affirmed the EPA's regulations and found the prevention of significant deterioration to be implicit in the Clean Air Act.

²⁴¹ See notes 94-97 *supra* and accompanying text.

²⁴² 40 C.F.R. § 52.21 (1972).

²⁴³ See, e.g., Note, *Review of EPA's Significant Deterioration Regulations: An Example of the Difficulties of the Agency-Court Partnership in Environmental Law*, 61 VA. L. REV. 1115, 1139-40, 1158-67 (1975). "By giving the states virtually complete control over the classification of areas within their borders, the new regulations allow the states to determine what constitutes 'significant deterioration.'" *Id.* at 1159. Comment, *Sierra Club v. Ruckelshaus — On a Clear Day*, 4 ECOLOGY L.Q. 739, 759 (1975):

Without the strong guiding hand of the federal government states may succumb to economic and political pressures to compete with other states for industry, by adopting a lax definition of "significant" deterioration, or by classifying as many clean air regions as possible as Class III. Viewed in this light, EPA's permissiveness regarding state NSD [no significant deterioration] policies may be the single most important factor endangering our remaining clean air resources.

vision would apply to all air quality control regions which the states maintain are within both the primary and secondary standards for sulfur dioxide and particulates.²⁴⁵ In addition to the general purpose of protecting the public health and welfare from the adverse effects of pollution, this amendment is designed "to preserve, protect, and enhance the air quality in national parks . . . and other areas of special national or regional natural, recreational, scenic, or historic value."²⁴⁶

In order to effectuate these purposes, the amendment lists certain areas as class I and mandates that they remain so classified.²⁴⁷ All other regions will initially be designated as class II, and certain of those areas may never be redesignated as class III.²⁴⁸ The state has discretion to designate other areas as class I.²⁴⁹ Redesignation of an area as class III, however, requires adherence to detailed procedures, including public hearings and the approval of a majority of the residents of the area to be redesignated.²⁵⁰

New major emitting facilities which plan to locate in a no significant deterioration area must apply for a permit from the state. That permit, when issued, will require emission limitations to insure that air quality will not deteriorate beyond the prescribed increment.²⁵¹ The permit will also require that the facility adopt the "best available control technology."²⁵² The state is required to provide an opportunity

²⁴⁴ CONF. REP. NO. 1742, 94th Cong., 2d Sess. § 123(a) (1976). This section proposes to add a new section 160 to Title I of the Clean Air Act Amendments of 1970. Subsequent citations will refer to proposed section 160.

²⁴⁵ *Id.* § 123(a) (proposed § 160(b)(1)). That is, those regions identified by a state pursuant to proposed section 107(d)(1)(D) or (E). See note 230 *supra*.

²⁴⁶ *Id.* § 123(a) (proposed § 160(a)(2)).

²⁴⁷ *Id.* § 123(a) (proposed § 160(b)(2)) specifies:

[A]ll international parks, and each national wilderness area, and national memorial park which exceeds five thousand acres in size, and each national park which exceeds six thousand acres in size and which is in existence on the date of enactment of the Clean Air Act Amendments of 1976, shall be Class I areas.

²⁴⁸ *Id.* § 123(a) (proposed § 160(d)(1)(A)-(C)):

(A) an area established as class I under subsection (b)(2),

(B) a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore and seashore, which exceeds 10,000 acres in size, or

(C) a national park or national wilderness area established after the date of enactment of this Act which exceeds 10,000 acres in size

²⁴⁹ *Id.* § 123(a) (proposed § 160(b)(4)).

²⁵⁰ *Id.* § 123(a) (proposed §§ 160(d)(1)(D), 160(d)(2)(A)).

²⁵¹ *Id.* § 123(a) (proposed § 160(e)(1)(A)(i)).

²⁵² *Id.* § 123(a) (proposed § 160(e)(1)(A)(iv)). Best available control technology is defined as:

[A]n emission limitation based on the maximum degree of reduction of each pollutant . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning or treatment for control of each such pollutant.

Id. § 123(a) (proposed § 160(g)(4)). The interjection of this term leaves considerable discretion with the states the permitting authority. That discretion is exercisable, however, only within the bounds of the permitted increment for the class in question.

for public hearings on the proposed permit.²⁵³ Additional precautions are taken when the planned facility is expected to effect a class I area.²⁵⁴

Though the requirements of section 160 (nondegradation) have been injected into section 110(a)(2) (state implementation plans),²⁵⁵ it does not appear that Congress intends that the Administrator promulgate significant deterioration plans for the state, as is required when other portions of a plan are missing or unsatisfactory. This curious twist is not stated in the text of the amendments but is suggested in the Committee comments: "EPA may not promulgate the portion of a State Plan implementing nondegradation requirements."²⁵⁶ This is an apparent exception to section 110(a)(4), which imposes a mandatory duty on the Administrator with regard to other portions of state implementation plans.²⁵⁷

The Conference Committee further stated that "[t]he Administrator shall issue orders and seek other action to prevent issuance of an improper permit."²⁵⁸ This comment relates to a specific provision of the amendment, which imposes a mandatory duty on the Administrator to issue compliance orders under the federal enforcement section 113 and to seek injunctive relief when necessary to prevent the issuance of a permit that does not conform to the requirements of section 160.²⁵⁹ The composite result of these two sentences in the Committee Report would be to preclude federal promulgation while insisting upon federal enforcement.

Passage of the 1976-77 amendments with the inclusion of such a clearly delineated significant deterioration policy is necessary to the continued success of the Clean Air Act. Considerable concern has been expressed that the adoption of this policy would halt industrial progress and expansion as well as greatly increase the costs of production.²⁶⁰

²⁵³ *Id.* § 123(a) (proposed § 160(e)(1)(A)(ii)).

²⁵⁴ Whenever notice is filed by one of the parties authorized by statute to the effect that "emissions from a proposed major emitting facility may cause or contribute to a change in the air quality" in a class I area, the applicant will bear the burden of establishing that the facility will not contribute to a cumulative change in air quality in excess of the permitted increment. Should the projected increase in pollution levels be less than the statutory increment, a permit will not be issued where it can be established that the air quality related considerations outweigh any merits to the proposed location. Where the projected increase exceeds the statutory amount a permit may nevertheless be issued if the applicant can adequately establish that there will be no adverse impact on the air quality related value of said land. *Id.* § 123(a) (proposed § 160(e)(1)(C)(ii)).

These latter two provisions should be viewed as a valve through which accommodation to peculiar circumstances may be obtained. Nevertheless, the inclusion of such a valve provides an avenue for dispute and should be used sparingly. The statutory increments are appropriate for the usual case and the presumption of their applicability must be rebutted on a case by case basis.

²⁵⁵ See note 233 *supra*.

²⁵⁶ CONF. REP. NO. 1742, 94th Cong., 2d Sess. 103 (1976).

²⁵⁷ 42 U.S.C. § 1857c-5(a)(4) (1970).

²⁵⁸ CONF. REP. NO. 1742, 94th Cong., 2d Sess. 103 (1976).

²⁵⁹ *Id.* § 123(a) (proposed § 160(i)(1)).

²⁶⁰ See, e.g., ENVIR. REP. (BNA), 7 *Current Dev.* 10, 13-14 (May 7, 1976); *id.* at 45 (May 14, 1976); *id.* at 204 (June 4, 1976). For a criticism of those remarks, see, e.g., *id.* at 140 (May 28, 1976); *id.* at 237-38 (June 11, 1976).

Attempts were made to delete this portion from the amendments, but thus far such attempts have proved unsuccessful. It is hoped that congressional support will remain firm and that the nation will soon have a "definitive" policy for maintaining and preserving the nation's clean air areas.

C. Federal Enforcement

As the process of developing and approving state implementation plans comes to a close (except for revisions required to conform with the 1976-77 amendments), enforcement will become the focus for the success or failure of air pollution control. Although the intent of Congress was attainment of the primary standards by 1975, extensions until 1977 are quite common.²⁶¹ The Conference Bill would amend section 113 through the addition of a new subsection providing for the issuance of enforcement orders by the state or the Administrator and specifying compliance dates as late as January 1, 1979.²⁶² The enforcement order is to be source-specific and thus would not result in amendment of the deadline for an entire state-wide implementation plan, but rather would provide an exception to compliance with the plan for the individual sources. Certain conditions must be met in order to issue such orders including: a public hearing, compliance schedules and timetables, reasonable interim control measures, final compliance by January 1, 1979, and a provision for imposition of a monthly penalty in the event that a major emitting facility is not in compliance by the 1979 deadline.²⁶³ If the Administrator finds that an enforcement order issued by a state does not satisfy these minimum requirements, he has an affirmative duty to object and to issue a federal enforcement order in its place.²⁶⁴

Once a facility has received such an enforcement order, it will be

²⁶¹ It was noted in the EPA's annual report to Congress that more than half the air quality control regions were not in compliance with the primary standard for particulates during 1975. Fourteen percent of the regions did not meet the sulfur dioxide standard. ENVIR. REP. (BNA), 7 *Current Dev.* 64 (May 21, 1976).

²⁶² CONF. REP. No. 1742, 94th Cong., 2d Sess. § 111(a) (1976) (amending § 113 (d)(1), 42 U.S.C. § 1857c-8 (1970)). Subsequent citations will refer to proposed section 113. The bill provides that:

A State (or, after thirty days notice to the State, the Administrator) may issue an enforcement order for any stationary source which specifies a date for final compliance with an applicable emission limitation later than the date for attainment of any national ambient air quality standard specified in the applicable implementation plan: Provided, That . . . (D) the order provides for final compliance . . . as expeditiously as practicable, but in no event later than January 1, 1979. . . .

²⁶³ *Id.* § 111(a) (proposed § 113(d)(1)(A)-(E), 42 U.S.C. § 1857c-8(d)(1)(A)-(E)). The monthly penalty for failure to meet the 1979 deadline will be discussed in more detail *infra* at notes 272-78 and accompanying text.

²⁶⁴ While the duty is an affirmative one, it does not appear to be mandatory. *Id.* § 111(a) (proposed § 113(d)(2), 42 U.S.C. § 1857c-8(d)(2)): "An enforcement order proposed by a State shall issue . . . unless the Administrator, within ninety days of receipt of any proposed order, objects in writing to the issuance of such order as not consistent with the requirements of paragraph (1) of this subsection." The Administrator may not object to any enforcement order that is more stringent than necessary to meet those requirements. *Id.*

free from citizen suits under section 304 and from federal enforcement proceedings under other subsections of section 113.²⁶⁵ This provision minimizes situations where a state has granted a variance to a source but where federal enforcement proceedings may be instituted because the federal EPA has not approved the state variance. If, however, a source violates the enforcement order, then the other measures provided by section 113 will apply.²⁶⁶ The amendments do not state whether noncompliance with an enforcement order would constitute a violation for which enforcement by citizens would be possible.²⁶⁷

Other requirements, such as a demonstration of technological infeasibility or economic hardship, do not appear to be mandated in order for any source to obtain an enforcement order with compliance thereby extended as late as January 1, 1979.²⁶⁸ Due to the minimal requirements provided by the Conference Bill,²⁶⁹ it seems likely that this amendment would result in a widespread practice of extensions through the end of 1978. It must be assumed that such extensions were foreseen and intended by the Conference Committee. Any compliance order issued under section 113(a), and any consent decree obtained prior to enactment of the 1976 amendments, will remain in effect only to the extent that they are not in conflict with the new 1979 deadline.²⁷⁰ Therefore, any consent decrees heretofore signed by the EPA, with compliance dates of 1979 and beyond, will be void and must be modified to comply with the amended guidelines. Beyond January 1, 1979, how-

²⁶⁵ *Id.* § 111(a) (proposed § 113(d)(7)(A), 42 U.S.C. § 1857c-8(d)(7)(A)).

²⁶⁶ *Id.* § 111(a) (proposed § 113(d)(7)(B), 42 U.S.C. § 1857c-8(d)(7)(B)).

²⁶⁷ Section 304 citizen suit enforcement was explicitly mentioned as being unavailable where a source is in compliance with an enforcement order. *Id.* No mention is made of that section, however, when a source is not in compliance with such an order, although specific mention is made of the availability of federal enforcement measures under section 113. On the face of the amendment standing alone, citizen suits would appear to be unavailable. Section 304, however, provides for commencement of a civil action: "against any person . . . who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 42 U.S.C. § 1857h-2 (1970). This language is broad enough to include an enforcement order under the newly proposed subsection 113(d).

²⁶⁸ CONF. REP. NO. 1742, 94th Cong., 2d Sess. § 111a (1976) (amending § 113(d)(3), (4), (5)) provides for certain exceptional circumstances. For example, proposed section 113(d)(3) would appear to apply to older, obsolete plants where the "source intends to comply by means of replacement of the facility, a complete change in production process, or a termination of operation." These plants may operate until 1979 without the use of any interim control measures, provided they post a bond which will be immediately forfeited if the facility is not replaced, changed, or closed down.

Proposed section 113(d)(4) rewards innovative new production processes and control techniques which will result in emissions reductions significantly greater than what is presently required. Such facilities will have until January 1, 1981 to comply.

A special exception is also made under proposed section 113(d)(5) for major emitting facilities which must convert to coal either to comply with 1974 amendments or because of curtailment of natural gas supplies where such a conversion will result in violation of the applicable implementation plan. Those sources have a final compliance date of July 1, 1980. In the interim, the state must prescribe emission limitations necessary to assure that pollution levels will not exceed the national primary standard as a result of the source's conversion to coal.

²⁶⁹ See note 263 *supra* and accompanying text.

²⁷⁰ *Id.* § 111(a) (proposed § 113(d)(10), 42 U.S.C. § 1857c-8(d)(10)).

ever, nondiscretionary penalties will discourage further industry delay.²⁷¹ Section 119 of the proposed Conference Bill would require that each enforcement order previously issued be amended by 1978 to provide for a "delayed compliance penalty." This penalty would be imposed automatically against any source not in compliance by the 1979 deadline unless noncompliance is "entirely beyond the control of the owner or operator."²⁷² The penalty amount is to be computed by the states, pursuant to guidelines issued by the Administrator, on the basis of information furnished by each source stating the type of continuous emission control technique which will be used by that source, the estimated cost of compliance, including costs of obtaining financing, and the estimated annual costs of operation and maintenance.²⁷³ The total costs over a normal amortization period of not more than ten years will be assessed in equal monthly installments.²⁷⁴ The Administrator may modify the amount if he finds it to be *less* than the amount which would be required by the guidelines.²⁷⁵

The penalty provision makes economic sense. The economic benefit of delay will be eliminated, since it will cost industry less to comply with the 1979 deadline than to seek further extensions. Even the provision for judicial review in district court states that a pending appeal of the amount of penalty assessed will not stay the obligation to make the monthly payments.²⁷⁶ The only loophole appears to be a challenge on the grounds that noncompliance was entirely beyond the control of the owner or operator. An appeal on those grounds may stay the commencement of the monthly payments.²⁷⁷ The statutory language affords no guidance as to what constitutes "entirely beyond the control." The intent of the Act would seem to call for a strict construction of this phrase so that industry cannot continue to claim the defenses of unavailability of financing and technological infeasibility as something entirely beyond their control. A restrictive interpretation by the courts to include only embargoes, strikes, and other such events would appear to be necessary in order to close this otherwise significant loophole.²⁷⁸

Another change in the federal enforcement provision amends section 113(b) to make the Administrator's duty to commence a suit for in-

²⁷¹ CONF. REP. NO. 1742, 94th Cong., 2d Sess. § 111(a) (1976) (adding § 119(a)). Subsequent citations will refer to proposed section 119.

²⁷² *Id.*

²⁷³ *Id.* § 111(a) (proposed § 119(b)).

²⁷⁴ *Id.* § 111(a) (proposed § 119(c)(2)(B)).

²⁷⁵ *Id.* § 111(a) (proposed § 119(d)(1)).

²⁷⁶ *Id.* § 111(a) (proposed § 119(e)(2)(A)).

²⁷⁷ *Id.* § 111(a) (proposed § 119(e)(2)(B)). Nevertheless, the owner or operator will be required to post a bond equal to the amount of potential liability during the period of the stay. If successful, the bond may be cancelled.

²⁷⁸ The broader House bill would have provided for extensions under many circumstances only one of which was that: "the necessary means of emission limitation is unavailable to such source by reason of an embargo, strike, or other event primarily beyond the control of the owner or operator of the source." H.R. 10498, 94th Cong., 2d Sess. § 103(a) (adding § 121(c)(1)(C) (1976)).

junctive relief and for civil penalties a mandatory one.²⁷⁹ Under the 1970 Act, while the Administrator had a nondiscretionary duty under section 110(c) to promulgate a plan for a state that failed to submit an adequate one, his enforcement responsibilities were stated to be discretionary. The ramifications of this change, if adopted, are difficult to predict. Violations of compliance orders pursuant to section 113(a), enforcement orders pursuant to proposed section 113(d), any requirement of an applicable implementation plan during federally assumed enforcement or upon thirty days notice are all among the provisions the Administrator would have a mandatory duty to enforce.²⁸⁰

V. CONCLUSION

In order to draw conclusions regarding the overall success or failure of the Clean Air Act of 1970, it is necessary to review the congressional intent behind the 1970 amendments and to measure against the stated goals the actual progress that has been made in air pollution control. There were two novel features in the 1970 legislation which were not present in prior versions of the Act. The first was the shift from almost exclusive reliance upon the states to lead the way in pollution control to the present federal-state alliance. The second was the adoption of a policy of "technology-forcing" instituted by the system of deadlines and reinforced by the force of Congress' words that industry must either meet the standards within the allotted time or be closed down. Each of these additions in the 1970 Act have engendered the disputes previously discussed.

For the sake of uniformity, certain preliminary responsibilities were delegated to the federal agency. The actual implementation was to be the primary responsibility of state and local governments. Perhaps because of an awareness that the state's role would be voluntary, Congress provided that, in the event a state failed to cooperate in either the development of a plan to implement the Act or in the enforcement of that plan, a secondary back-up role would be assumed by the federal agency. Initially it was agreed that a national minimum level of air quality was necessary to protect the public health and welfare. Competition for industry among the various states contributed significantly to this decision. Without this minimal degree of federal involvement in air pollution control, most would agree that many states would be no further along the way to cleaner air than they were in 1970.

In contrast to the more or less accepted premise of the necessity of national standards, the precise boundaries of federal versus state participation have been the subject of much more constant dispute. It

²⁷⁹ CONF. REP. NO. 1742, 94th Cong., 2d Sess. § 112 (1976) (amending § 113(b), 42 U.S.C. § 1857c-8 (1970)) changes the language of § 113(b) from: "[T]he Administrator *may commence* a civil action for appropriate relief, including a permanent or temporary injunction" to "[t]he Administrator *shall commence* a civil action for appropriate relief, including a permanent or temporary injunction, or to assess and recover a civil penalty of not more than \$10,000 per day of violation or both." (Emphasis added.) For a fuller discussion of the 1970 version see note 106 *supra*.

²⁸⁰ *Id.* § 112 (proposed § 113(b)(1), (2), 42 U.S.C. § 1857c-8(b)(1), (2)).

now seems clear that the Federal Administrator, if called upon to promulgate a plan for a state that has failed to submit an acceptable plan, has authority to promulgate a plan for the control of emissions only as stringent as would be necessary to comply with the national standards. However, when a state that has a plan which is more stringent than necessary fails to enforce certain provisions, a question remains with regard to the extent of the Administrator's authority to enforce that provision. The most acceptable solution would appear to be the legislative determination that a plan approved by the Administrator becomes federal law and is thus enforceable by the federal agency. Whether a state can be required to adopt and enforce a federally promulgated plan is another issue which illustrates the truly delicate nature of the federal-state relationship and the serious constitutional questions which may arise. The upcoming resolution of this issue by the Supreme Court is expected to confirm the voluntary nature of the state's cooperation in the implementation and enforcement of pollution control plans, but it is not anticipated that this will undermine the goal of assigning primary responsibility to the states.

The technology-forcing aspects of the Clean Air Act may be even more controversial than the increased federal participation. Resistance by industry and reluctance on the part of the courts in the context of sulfur dioxide compliance by stationary sources has been amply demonstrated. The large numbers of air quality control regions which did not attain the national primary standard by 1975 indicates not only the resistance with which the Clean Air Act was met, but also the difficulty of the task which Congress faced in 1970. Developments since 1970 have brought about a tremendous increase in the level of sophistication with which environmental control is approached. The new amendments appear to recognize the need for some relaxation of the deadlines, but the proposed monetary penalties should insure attainment before the end of this decade. The new approach is highly commendable from an economic standpoint, since it denies any competitive benefit to those industries seeking to delay compliance. If these new enforcement measures become law and are imposed with diligence, industry may come to view pollution control as an accepted cost of doing business.

KAREN HAMMACK

